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95-1709

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TEMPLETON COAL COMPANY, INC., SHERWOOD-TEMPLETON COAL COMPANY, INC., PRINCETON MINING COMPANY, INC., and BERWIND CORPORATION,
Petitioners,

v.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and ITS TRUSTEES, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O.S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

JESSE H. CHOPER
Berkeley, California 94720
(510) 642-0339

ROSEMARY M. COLLYER
Counsel of Record
J. MICHAEL KLISE
TARA W. BLANCHARD
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

DAVID H. GOELLER
WILKINSON, GOELLER, MODESITT, WILKINSON & DRUMMY
333 Ohio Street
Terre Haute, Indiana 47808
(812) 232-4311
Attorneys for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

Petitioners were once active coal mining companies, but they permanently closed or sold their mines in the years between 1954 and 1966. The Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701 *et seq.*, requires Petitioners to contribute to a fund created by statute in 1992 for health benefits for certain retired coal miners and relatives, based entirely on the fact that Petitioners once were signatory to a collective bargaining agreement that expired decades ago. The questions presented by this petition are:

1. Whether, as applied to Petitioners, the retroactive funding provisions of the Coal Industry Retiree Health Benefit Act of 1992 violate the Due Process Clause of the Fifth Amendment.

2. Whether, as applied to Petitioners, the retroactive funding provisions of the Coal Industry Retiree Health Benefit Act of 1992 violate the Taking Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDINGS

This case arises from a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the United States District Court for the Southern District of Indiana. Petitioners and Respondents, as identified in the caption, are the only parties. Petitioners are all privately held companies. This case was decided by the Court of Appeals with a companion case in which the parties were Davon, Inc. and these same Respondents.

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DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and ITS TRUSTEES, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O.S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Templeton Coal Co., Inc., Sherwood-Templeton Coal Co., Inc., Princeton Mining Co., Inc., and Berwind Corp. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit dated January 25, 1996.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals, dated January 25, 1996, is reported at 75 F.3d 1114 (7th Cir. 1996) and is set forth in the Appendix at 1a-33a. The opinion and order of the United States District Court granting summary judgment to Respondents, dated April 4, 1995, is reported at 882 F. Supp. 799 (S.D. Ind. 1995) and is set forth in the Appendix at 34a-83a. The opinion and order of the District Court denying Petitioners' motion for preliminary injunction dated November 18, 1993, is reported at 855 F. Supp. 990 (S.D. Ind. 1993) and is set forth in the Appendix at 84a-109a. The District Court's order of preliminary injunction, No. TH 93-158-C, dated October 25, 1993, is set forth in the Appendix at 110a-112a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued and judgment entered on January 25, 1996. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), Pub. L. No. 102-486, Title XIX, 106 Stat. 3036 *et seq.* (codified at 26 U.S.C. §§ 9701 *et seq.*), is set forth in the Appendix at 113a-148a.

STATEMENT OF THE CASE

The Coal Act creates and imposes on Petitioners a wholly new obligation to contribute to an employee health benefit plan because, thirty or more years ago, Petitioners employed *some* of the plan's beneficiaries under a long-expired collective bargaining agreement. The decision below, which upheld the Coal Act's constitutionality as applied to Petitioners, raises important federal questions concerning whether Congress can retroactively impose a totally new liability based on collective bargaining relationships that ended decades earlier.

Petitioners are companies that once mined coal with employees represented by the United Mine Workers of America ("UMWA"). They permanently closed their mines between 1954 (Templeton) and 1966 (Princeton), after fulfilling all obligations to their employees, including contributions to a welfare plan established in 1950.[1] After Petitioners' departures from the coal mining business, other companies that continued to mine coal using UMWA miners created two new health plans for miners and retirees in 1974. Eventually, the new plans became financially unstable. Yet the Coal Act requires *Petitioners*, who are strangers to those plans, to contribute, for the next forty or more years, to a statutory fund combining the two new health benefit plans, only because Petitioners once were parties to a UMWA collective bargaining agreement after 1946. Petitioners challenge this retroactive liability under the Due Process and Taking Clauses of the Fifth Amendment. U.S. CONST. amend. V.

A. Background and Facts

1. *Petitioners' Former Coal Mining Operations*

Petitioners have not mined coal or employed UMWA-represented miners for decades. Templeton Coal Com-

[1] In these respects and others, Petitioners differ significantly from companies that have previously sought the Court's review of other aspects of the Coal Act's constitutionality. *See infra* pt. I.E.

ments. Trustees of the Fund retained discretion over the amount and nature of benefits to be paid.[1] The Fund was the exclusive provider of health, pension, and other welfare benefits for UMWA active and retired miners and their dependents, and its operation remained essentially unchanged from 1950 through 1974.[2]

In 1974, the BCOA and the UMWA agreed to divide the 1950 W & R Fund into four separate multi-employer plans: two for pension benefits and two for other benefits. This was largely in response to the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), which mandated that pension plans be fully funded on an actuarial basis. The two non-pension plans were known as the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Trust") and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust"). The 1950 Benefit Trust provided health benefits to miners who retired before 1976 and their dependents, while the 1974 Benefit Trust provided health benefits to miners who were active, or who retired on or after January 1, 1976, and their dependents.

Economic difficulties that ultimately led to the Coal Act surfaced in the late 1970s. Several factors caused the restructuring of the UMWA Benefit Trust in 1978, including a significant reduction in the amount of coal produced under the NBCWAs, the retirement of a generation of miners, the rapid escalation of health care costs, and the steady increase in the number of "orphan" retirees—those whose employers either had gone out of

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[1] Plaintiffs point to numerous occasions from 1950 to 1960 on which the Trustees exercised their authority to terminate, decrease, or otherwise modify benefits.

[2] Subsequent to the 1950 agreement, NBCWAs were negotiated by the UMWA and the then-operating coal producers in 1955, 1956, 1958, 1964, 1966, 1968, and 1971. From 1950 to 1974, the Fund and its predecessors collected approximately $3.9 billion in contributions from coal operators and paid approximately $1.5 billion in hospital and medical care benefits, $283 million in survivors and other related benefits, and $2 billion in pension benefits.

business or had switched to non-UMWA labor. After a 111-day strike and tense negotiations, the UMWA and BCOA agreed to what would be the last restructuring of the UMWA benefit trusts. The 1978 NBCWA continued the multi-employer approach for providing health care benefits to persons who retired before January 1, 1976, but it provided that persons who retired on or after that date would receive health care benefits from single-employer plans maintained by the retirees' "last NBCWA signatory employer." The 1974 Benefit Trust was retained for miners who retired on or after January 1, 1976, and whose last signatory employers were no longer in business. The 1978 NBCWA also added "guarantee" and "evergreen" clauses, which obligated signatory operaors to make sufficient contributions to ensure benefits and to continue making contributions after the expiration of the NBCWA.

The basic trust structure was maintained by subsequent NBCWAs in the 1980s, but economic difficulties continued and worsened. By 1990, the UMWA Benefit Trusts had incurred debts of over $100 million, and their funding from coal producers was decreasing faster than the beneficiary population. The crisis led to a 10-month strike at the Pittston Coal Company and threatened the stability of coal production as well as the economies of coal-producing states. As part of the settlement of the Pittston strike, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission") to make recommendations to assure the long-term viability of the 1950 and 1974 Benefit Trusts.

The Coal Commission issued its report in November 1990, documenting the financial crisis of the UMWA Benefit Trusts and stating that the primary culprit was the escalating cost of paying for "orphan" retirees whose last NBCWA signatory employer had either left the coal business or was otherwise not a contributing coal pro-

ducer. The Commission made findings and recommendations as follows: (1) that retired miners are entitled to health care benefits that were promised them and that such commitments must be honored; (2) that a statutory obligation to contribute to the trusts should be imposed on current and former signatories to NBCWAs; and (3) that mechanisms should be enacted to prevent the future dumping of retiree health care costs on the UMWA Trusts. The Coal Commission proposed two alternative methods for financing orphan retirees: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators; and (2) a private multi-employer fund financed by signatories to the 1978 and later NBCWAs, and, to provide benefits for orphaned retirees, further funded by all employers that were signatories to one or more NBCWAs in the past.

B.

The Coal Act

After the Coal Commission issued its report, Congress commenced hearings to consider its findings and recommendations. See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Finance Comm.*, 102d Cong., 1st Sess. (1991) ("*Senate Hearings*"). In October 1992, Congress passed the Coal Act as part of the Energy Policy Act of 1992 with the following stated purpose:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees of the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Pub.L. No. 102-486, § 19142(b). Congress found that the coal industry's existing system for funding retiree health benefits had to be modified "to identify persons most responsible for plan liabilities. . . ." *Id.* § 19142 (a). The Coal Act merged the 1950 and 1974 Benefit Trusts into the UMWA Combined Benefit Fund ("Combined Fund"). 26 U.S.C. § 9702(a)(2). The Combined Fund provides benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive and were receiving benefits from the 1950 or 1974 Trusts. 26 U.S.C. § 9703.

Congress adopted a financing arrangement similar to the Coal Commission's second alternative recommendation.[3] Every coal operator that signed NBCWAs is required to participate in the Combined Fund's financing. 26 U.S.C. § 9701(b), (c)(1). The task of assigning beneficaries under the Act was given to the Secretary of Health and Human Services ("Secretary"). 26 U.S.C. § 9706(a). Each signatory must pay premiums for its own former employees and their covered dependents, as well as a proportional share of the premiums for "orphan"

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[3] The parties disagree over whether the Coal Commission's second alternative proposal recommended a reach-back to 1950 signatories or only to 1978 signatories. Defendants cite the following language from the Commission as support for their statement that it recommended a reach-back to 1950 signatories:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts,* establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator. (emphasis added by defendants).

We note only that this language is ambiguous and that it is therefore not clear whether Congress "reached-back" further than the Commission recommended. In any event, the question whether reaching back beyond 1978 signatories was rational subsumes the question whether it was rational to ignore the Coal Commission.

retirees whose employers have gone out of business. 26 U.S.C. § 9704(a)-(d). If a retiree worked for more than one signatory, he is assigned to the most recent that signed an NBCWA in 1978 or after. 26 U.S.C. § 9706 (a)(1)-(2). If none signed in or after 1978, the retiree is assigned to the pre-1978 signatory that employed him for the longest period prior to 1978. 26 U.S.C. § 9706 (a)(3).

C.

The Plaintiffs

The plaintiffs in this case are companies that signed the 1950 NBCWA. Several plaintiffs also signed successor NBCWAs in the 1950s and 1960s; however, none signed the 1974 NBCWA nor any subsequent NBCWA. Because the Coal Act's financing provision reaches back to 1950 NBCWA signatories, each plaintiff has been assigned beneficiaries under the Act and as such is obligated to pay premiums to the Combined Fund. This is a consolidated appeal arising out of two separate but related suits by plaintiffs. The first complaint was filed by Templeton Coal Company ("Templeton"), Sherwood-Templeton Coal Company ("Sherwood"), Princeton Mining Company ("Princeton"), and Berwind Corporation ("Berwind"). Collectively, we will refer to these plaintiffs as the "Templeton Employers." The relevant background of each follows:

(1.) Templeton. Incorporated in 1920, Templeton closed its last mine in 1954. Currently, it engages in business that is unrelated to coal production. Templeton signed the 1950 NBCWA and its amendments in 1951 and 1952; it stopped participating in the UMWA Funds in 1954. The Secretary assigned 39 beneficiaries to Templeton at a first-year cost of $138,131.35.[4]

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[4] The figures for assigned beneficiaries are for the first year only. In some cases, the companies were assigned additional beneficiaries in subsequent years.

(2.) Sherwood. Incorporated in 1929, Sherwood, a wholly owned subsidiary of Templeton as of 1967, sold its last mine in 1960 and is currently engaged in business unrelated to coal production. Sherwood signed the 1950 NBCWA and its amendments in 1951, 1952, 1955, 1956, and 1958; it last participated in the UMWA Funds in 1960. The Secretary assigned four beneficiaries to Sherwood at a cost of $15,147.22 for the first year.

(3.) Princeton. Incorporated in 1923, Princeton stopped mining coal in 1966 and is also currently engaged in non-coal activities. Princeton was a signatory to the 1950 NBCWA and subsequent amendments in 1951, 1952, 1955, 1956, and 1958; it participated in the UMWA Funds until 1966. Princeton was assigned 117 beneficiaries at a first-year cost of $419,325.17.

(4.) Berwind. Originally Berwind-White Coal Mining Company, it was a signatory to the 1950 NBCWA and its amendments in 1951, 1952, 1955, 1956, and 1958. Berwind closed its last mine in 1962, but in January 1963 it merged with another coal company and became a 98% shareholder of Reitz Coal Company; Reitz was a signatory to the 1968, 1971, 1974, 1978, and 1981 NBCWAs. Currently, Berwind owns the Berwind Natural Resources Corporation, which is the parent of several coal companies; these companies pay royalties to Berwind on the coal mined. The Secretary assigned by far the largest number of beneficiaries to Berwind among the plaintiffs —914 at a first-year cost of $3,227,727.96.

The second complaint was filed by Davon Incorporated ("Davon"). Davon's predecessor, the New York Coal Company, was engaged in coal mining from 1933 until 1954. During this time, it employed UMWA-represented miners and was signatory to the 1950 NBCWA and its 1951 and 1952 amendments.[5] New York Coal sold its

[5] Davon states in its brief that it has no records indicating that its predecessor signed any NBCWA. It noted that the Combined

coal mining business in 1954 to Sunnyhill Coal Company and agreed as part of the sale not to engage in the coal business. In 1957, New York Coal became Davon, Inc., through an asset purchase. Neither New York Coal nor its successor Davon has engaged in coal mining since 1954. The Secretary assigned 98 beneficiaries to Davon for a first-year cost of $327,428.80.

The beneficiaries assigned to each of the five plaintiff-companies consist of approximately 30 percent retired UMWA miners who worked for plaintiffs and 70 percent spouses and dependents of those miners. Plaintiffs point out that many of the beneficiaries assigned to them have only the most tenuous connection to the company. For example, some beneficiaries worked for less than a day at the contributing company. Nonetheless, the Coal Act requires plaintiffs to pay their health benefits for life. In addition, plaintiffs must also pay premiums for "orphan," or unassigned, miners and relatives. The contributions for unassigned beneficiaries, as stated above, are calculated based on the company's proportion of assigned beneficiaries. These contributions will continue until the last beneficiary dies.

D.

Proceedings Below

The Templeton Employers filed suit in the district court on September 2, 1993, challenging the constitutionality of the financing provisions of the Coal Act, 26 U.S.C. § 9704, under the Due Process Clause and the Takings Clause of the Fifth Amendment. The Combined Fund and its Trustees intervened to defend the validity of the statute, but on October 25, 1993, the district court issued

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Fund's only basis for concluding that New York Coal was a signatory from 1933 to 1954 was a computer list prepared by the Combined Fund. We are aware of no evidence, and Davon points to none, that the Secretary erred in assigning beneficiaries to Davon.

an injunction against the Secretary and the Trustees enjoining them from enforcing the Coal Act. On November 3, 1993, Davon filed a complaint against the Secretary and the Combined Fund seeking the same relief as the Templeton Employers. After conducting a hearing, the district court on November 18, 1993, denied Davon's request for injunctive relief and vacated the October 25 injunction in the Templeton Employers' case *sua sponte*. *Templeton Coal Co. v. Shalala*, 855 F.Supp. 990 (S.D. Ind.1993). The court said only that "[w]hen originally issuing the injunction, the court was reading the Due Process and Takings cases too narrowly." *Id.* at 999 n. 10.

The parties subsequently filed cross-motions for summary judgment. On April 4, 1995, the district court denied plaintiffs' motion and granted the motions of the Secretary and the Trustees. *Templeton Coal*, 882 F.Supp. at 799. The district court first rejected plaintiffs' argument that the Coal Act is a retroactive statute subject to heightened scrutiny:

> Because the Coal Act does not write on an historical blank slate, but merely provides for a prospective statutory continuation of collectively-bargained health care premium payments for UMWA miners dating back nearly half a century, the Act imposes neither "new" nor "retroactive" legal duties on Plaintiffs in the constitutional sense.

Id. at 815. Ultimately rejecting plaintiffs' due process argument, the district court stated, "Plaintiffs did work in the [coal] industry at one time. This fact . . . would be enough to keep Plaintiffs' connection to the current financial obligation from being considered arbitrary or void of reason." *Id.* at 821. The court also rejected plaintiffs' Takings Clause argument, primarily because it considered unreasonable any expectation by the plaintiffs that they would never again be responsible for health benefits for retired UMWA miners, especially in light of

the continued provision of such benefits and the pervasive nature of government regulation in every facet of the coal mining industry. *Id.* at 826.

II.

On appeal, the Templeton Employers and Davon argue that the district court erred in granting defendants' motion for summary judgment. Specifically, they argue that the reach-back financing provision of the Coal Act is unconstitutional as applied to them under the Due Process and Takings Clauses of the Fifth Amendment. We will address these arguments in turn. This Court reviews the grant of summary judgment *de novo. East Food & Liquor, Inc. v. United States*, 50 F.3d 1405, 1410 (7th Cir. 1995).

A.

Due Process

The constitutional analysis necessarily begins with a discussion of the appropriate standard of review. The Coal Act is "a classic example of an economic regulation —a legislative effort to structure and accommodate 'the burdens and benefits of economic life.' " *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83, 98 S.Ct. 2620, 2636, 57 L.Ed.2d 595 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752). Because the Coal Act is an economic regulation that burdens no fundamental rights, it is subject only to the minimum scrutiny, rational basis test:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Turner Elkhorn, 428 U.S. at 15, 96 S.Ct. at 2892. Substantive due process requires only that economic legisla-

tion be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601.

In mounting a due process challenge to the Coal Act, plaintiffs in this case must maneuver through "unusually inhospitable legal terrain." *In re Chateaugay Corp.*, 53 F.3d 478, 487 (2d Cir. 1995) (rejecting due process challenge to the Coal Act), certiorari denied, —— U.S. ——, 116 S.Ct. 298, 133 L.Ed.2d 204. As the Second Circuit noted, since the 1935 decision in *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, the Supreme Court has failed to invalidate a federal economic regulation on substantive due process grounds. 53 F.3d at 487 (citing numerous Supreme Court cases upholding economic regulation). Instead, the Court has increasingly deferred to congressional judgment on economic policy, explicitly acknowledging the presumption in favor of constitutionality and reviewing only for rationality. As stated in *Duke Power*, that Congress's economic choices "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." 438 U.S. at 83-84, 98 S.Ct. at 2636.

Plaintiffs argue that we should subject the Coal Act to heightened scrutiny because it is an economic regulation that is applied retroactively. Retroactive legislation, they argue, imposes an added burden for judicial review, and such regulations are unconstitutional if they produce "harsh and oppressive" results. Plaintiffs' argument has two important components. First is the question whether the Coal Act is retroactive legislation; the second component is how retroactivity changes the due process analysis. The parties make much over whether the Coal Act is retroactive. We agree with plaintiffs that the Coal Act, as applied to them, is retroactive: "[E]very statute,

which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective." *Landgraf v. USI Film Prods.*, —— U.S. ——, ——, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229. More succinctly, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* Clearly that is the case here. The Coal Act attaches new legal consequences—mandatory payments to the Combined Fund—for the act of participating in some previous NBCWA. Accord *Chateaugay*, 53 F.3d at 489 (Coal Act has retroactive effect); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832, 836-837 (6th Cir.1995) (same), certiorari denied, —— U.S. ——, 116 S.Ct. 64, 133 L.Ed.2d 26. The district court's statement that the "Coal Act is simply not 'retroactive' for purposes of due process analysis," *Templeton Coal*, 882 F.Supp. at 813, is likely directed at the legal consequences of calling the statute "retroactive" rather than the actual reach of the statute.

The second component of plaintiffs' argument is their assertion that the retroactive nature of the Coal Act subjects it to greater scrutiny under the Due Process Clause. Unfortunately for plaintiffs, Supreme Court precedent could not be more clearly contrary to their position.[6] In

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[6] Plaintiffs argue that retroactive legislation such as the Coal Act is unconstitutional if it is "harsh and oppressive." They claim that the "harsh and oppressive" inquiry is a multi-factor analysis, focusing on, for example, the length of period affected, the foreseeability of the legislation, the disruption to settled expectations, and whether a party relied on the state of the law at the time it acted. In support, plaintiffs cite a host of cases, all of which are either misconstrued by plaintiffs or inapposite to this case. Plaintiffs' citation to cases addressing the constitutionality of revenue statutes is misplaced. The "harsh and oppressive" standard originated in *Welch v. Henry*, 305 U.S. 134, 147, 59 S.Ct. 121, 126, 83 L.Ed. 87, and has since been applied in other revenue statute cases,

Turner Elkhorn, supra, the Supreme Court upheld against constitutional attack the Black Lung Benefits Act of 1969, which in part required compensation for disabilities caused during employment prior to the statute's enactment. Plaintiffs cite the following language from *Turner Elkhorn* in support of their argument:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

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e.g., United States v. Hemme, 476 U.S. 558, 568-572, 106 S.Ct. 2071, 2077-2080, 90 L.Ed.2d 538, but the Court has made clear that the "harsh and oppressive" analysis as applied to economic legislation "does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn.*" *Gray*, 467 U.S. at 733, 104 S.Ct. at 2720; see also *United States v. Carlton*, —— U.S. ——, ——, 114 S.Ct. 2018, 2022, 129 L.Ed.2d 22; *Furlong v. C.I.R.*, 36 F.3d 25, 26-27 (7th Cir.1994). Cases from this Circuit confirm that when addressing economic legislation, the "harsh and oppressive" standard is merely a search for rationality per *Turner Elkhorn* and its progeny. *See Rhinebarger v. Orr*, 839 F.2d 387, 389 (7th Cir.1988), certiorari denied, 488 U.S. 824, 109 S.Ct. 71, 102 L.Ed.2d 48; *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1269 (7th Cir.1983), certiorari denied, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855.

In support of their argument that the "harsh and oppressive" standard encompasses a multi-factor test, plaintiffs read too much into several Supreme Court and Seventh Circuit cases. None of the cases cited applies a multi-factor test like the one plaintiffs propose and most are taken from revenue statute cases—cases that the Supreme Court has recently clarified should be governed by the rationality standard. See *Carlton, supra*. In addition, several of the factors alleged to be relevant are taken from cases interpreting the Contract Clause, even though the Supreme Court has explicitly stated that "federal economic legislation . . . is not subject to constraints coextensive with those imposed upon the States by the Contract Clause. . . ." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.* 508 U.S. 602, 113 S.Ct. 2264, 2289, 124 L.Ed.2d 539; see also *Gray*, 467 U.S. at 733, 104 S.Ct. at 2719.

428 U.S. at 16-17, 96 S.Ct. at 2893. However, plaintiffs ignore the true import of the Court's language. Far from saying that the retroactive aspects of legislation are subject to heightened scrutiny, the Court stated that both the retroactive and the prospective aspects are subject to the test of due process. The test of due process in assessing economic legislation is rationality. Thus the Court went on to inquire into the rationality of imposing liability for past actions. It concluded as follows:

> We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a *rational* measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . .

Id. at 18, 96 S.Ct. at 2983 (emphasis added). There can be no doubt about the Court's deference to Congress regarding retroactivity:

> [I]t is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators . . . or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the wisdom of Congress' chosen scheme. . . . It is enough to say that the Act approaches the problem of cost spreading *rationally* . . . .

Id. at 18-19, 96 S.Ct. at 2894 (emphasis added).

That the same due process standard applies to retroactive economic legislation was confirmed in *Gray, supra.* In that case, the Court upheld the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), which was applied retroactively to employers withdrawing from pension plans up to five months prior to enactment. The Court elucidated the somewhat misleading language from *Turner Elkhorn* that "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retro-

spectively," stating that the burden to justify retroactivity in economic legislation "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Gray*, 467 U.S. at 730, 104 S.Ct. at 2718 (quoting *Turner Elkhorn*, 428 U.S. at 16-17, 96 S.Ct. at 2892). The Court once again confirmed the meaning of *Turner Elkhorn* and *Gray* in *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328, where it stated that the retroactive aspects of economic legislation, as well as the prospective aspects, must meet the due process test: "a legitimate legislative purpose furthered by rational means." *Id.* at 191, 112 S.Ct. at 1112.

Plaintiffs are correct that this Court must give additional consideration to the retroactive effects of the Coal Act; however, they are incorrect in asserting that we must look beyond the rationality of Congress's economic choices. The additional consideration required by *Turner Elkhorn*, *Gray*, and *Romein* is that the retroactive aspects of economic legislation must be justified *independently* of the prospective aspects. In other words, Congress must have an independent rational basis for making a law retroactive, even where the prospective aspects of the legislation are plainly rational. This methodology was meticulously employed in *Turner Elkhorn*. There the Black Lung Benefits Act was plainly rational as to current employees of existing mining companies, but the Court independently analyzed the rationality of spreading the costs to companies for injuries bred in the past, including companies out of the mining business. The Court found the retroactive portion of the Act rational because it imposed liability on companies that profited from the fruits of the injured miners' labor and because those companies might have taken steps in the past to minimize black lung dangers. 428 U.S. at 18, 96 S.Ct. at 2893.

Thus we must independently analyze the retroactive aspects of the Coal Act's financing provisions and deter-

the same rule not apply when the liability is in a "wholly new" area that had never before been subject to congressional attention? In the words of Judge Hand, Petitioners had " 'no reason to suppose that any transactions of the sort will be taxed at all' " when they closed their mines and terminated their contractual relationships with the UMWA. *See United States v. Darusmont*, 449 U.S. 292, 300 (1981) (quoting *Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930)). The Court should define whether Congress selects a rational means when it de-stabilizes long-expired contracts with the addition of a "wholly new" liability.

E. The Court has previously declined to review two decisions that bear on Coal Act liabilities. Neither of them presented the issues of extreme retroactivity, lack of repose, and harsh and oppressive consequences as Petitioners' *as applied* challenge. *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995), involved a challenge by a signatory to the 1988 Agreement because it did not get credit for previously-paid withdrawal liability under that contract. *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995), raised questions of bankruptcy law; a former coal company had operated under Agreements until 1985; it challenged the Coal Act under the Due Process and Taking Clauses, but did not appeal those issues to the Court. Neither of these cases alters the need for Court attention to the important federal questions presented by this Petition.

II. AS APPLIED TO PETITIONERS, THE RETROACTIVE FUNDING PROVISIONS OF THE COAL ACT VIOLATE THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

This case also enables the Court to consider whether the Taking Clause[16] imposes *any* limit on Congress'

[16] The Due Process Clause and the Taking Clause entail separate inquiries. *United States v. Security Indus. Bank*, 459 U.S. 70, 75

power to force a private person, in the name of the public interest, to turn over financial assets to another private party without receiving any compensation or other benefit in return.

The Coal Act, as applied to these Petitioners, fits squarely within the Fifth Amendment's command: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V. The Coal Act requires Petitioners to bestow private property (money) for public use (stabilizing retiree health benefit plans in which they did not participate), without any compensation. It also "takes" Petitioners' legitimate repose interest in their long-expired collective bargaining agreements. *See Landgraf*, 114 S. Ct. at 1497. The court below relied on decisions that did not reach these issues and did not involve this statute—*Concrete Pipe*, 508 U.S. 602, 113 S. Ct. 2264, and *Connolly*, 475 U.S. 211. The narrow holdings of those cases, however, are not germane.

A. *Connolly* and *Concrete Pipe* upheld the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which requires a contributing employer to pay withdrawal liability to a multiemployer pension plan when the employer ceases to participate. *Concrete Pipe*, 113 S. Ct. at 2292; *Connolly*, 475 U.S. at 217. The Court stressed the voluntary nature, and the existing direct connection, of the employer's participation in the affected plans. In *Connolly*, MPPAA's constitutionality was challenged on the ground that the statute retroactively eliminated a collectively-bargained limitation on pension liability. Using the now-familiar three-part

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(1982) ("however 'rational' the exercise of [legislative] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment"). *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987) ("our verbal formulations in the takings field have generally been quite different" from "those applied to due process or equal protection claims").

analysis,[17] the Court held that no "Taking" had occurred. 475 U.S. at 224-28. Because the employers "voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA [which MPPAA amended]," they could not complain about the added liability Congress had imposed on them. *Id.* at 227.

Similarly, in *Concrete Pipe*, the Court held that MPPAA was not an unconstitutional "Taking" as applied to an employer who joined a multiemployer plan but was not a member of any of the employers' associations represented among the plan's trustees. *Concrete Pipe*, 113 S. Ct. at 2292. The employer "voluntarily chose to participate in the plan, notwithstanding" its non-membership and thus could constitutionally be held liable for increases in the unfunded vested liability that determined the size of its withdrawal obligation. *Id.* at 2291.

When applied to Petitioners, the Coal Act exceeds the MPPAA analogue in many respects. First, those employers had contributed to the very plan sought to be augmented by MPPAA, whereas Petitioners are strangers to the funds that were rescued by the Coal Act. Second, in *Concrete Pipe*, the challenged plan promised vested benefits, whereas the plan to which Petitioners contributed provided benefits at the sole discretion of the plan trustees. Third, the employers in the MPPAA cases already faced contingent liability under ERISA, whereas Petitioners' liabilities had been fully discharged for decades when the Coal Act was passed. Fourth, the Coal Act, unlike MPPAA, imposes liability on *any* signatory to *any* Agree-

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[17] The Court identified three factors that have "particular significance":

> (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

Connolly, 475 U.S. at 225 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

ment since 1946, regardless of whether a liable company has ceased mining coal, and regardless of the state of the law and the Agreement when it stopped mining. Moreover, the Coal Act ignores the pivotal question of *voluntary* agreement to participate in a plan, as the UMWA plans altered by the Coal Act *did not exist* when Petitioners closed or sold their mines. *See Concrete Pipe*, 113 S. Ct. at 2291; *Connolly*, 475 U.S. at 227.

In short, under the Coal Act, the "character of the governmental action," *Connolly*, 475 U.S. at 225, is quite different from what it is under MPPAA, warranting separate assessment of its constitutionality under the Taking Clause.

B. Petitioners in *Concrete Pipe* and *Connolly* had a current, voluntarily assumed relationship with the plans at issue when they became subject to withdrawal liability. *See* 113 S. Ct. at 2274; 475 U.S. at 217-19. By contrast, Petitioners here are total strangers to the liabilities that the Coal Act imposes upon them. The 1950 W&R Fund to which Petitioners once contributed was dissolved in 1974, when a new Agreement created two new health benefit funds. Subsequent Agreements increased the obligations of signatories to those contracts, but Petitioners had no role in—and no occasion to agree or disagree to—negotiating or maintaining the new plans in 1974, the selection of plan trustees, or the determination of expanded benefits or beneficiaries in later years.

MPPAA survived Taking Clause challenge because it requires a withdrawing employer "to fund its share of the plan obligations incurred *during its association with the plan*"; because the assessment of withdrawal liability "is not made in a vacuum, . . . but *depends directly* on the relationship between the employer and *the plan* to which it had made contributions"; and because there was no showing "that the withdrawal liability actually imposed on an employer will always be out of proportion to its ex-

perience *with the plan*." *Connolly*, 475 U.S. at 225-26 (emphasis added). Such a relationship is nonexistent between Petitioners and the two Benefit Plans which were created in 1974 and merged into the Combined Fund by the Coal Act. Indeed, Petitioners' "experience with the plan" contraindicated the "cure" that the Coal Act imposes, because they fully satisfied their obligations to the long-since dissolved 1950 W&R Fund and left it years ago in good financial health.

Whether the Taking Clause is satisfied when a government-compelled transfer of funds rests on so highly tenuous a ground was anticipated but not resolved in *Connolly*. *See* 475 U.S. at 235 (O'Connor, J., concurring) (constitutional concerns may arise if, for example, an employer "had no say whatever in establishing critical features of the plan that determine the level of benefits and the value of those benefits"). It is ripe for the Court's consideration in this case.

C. The principle of fairness at the core of the Taking Clause is undermined by a law's "interfer[ence] with distinct investment-backed expectations." *Connolly*, 475 U.S. at 225. As applied to Petitioners, this is a wholly different inquiry under the Coal Act than under MPPAA. The Coal Act's liabilities spring from events decades before its passage, whereas MPPAA liability rests on an existing contractual relationship. Moreover, in MPPAA, the plans were already subject to ERISA, and " 'those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' " *Concrete Pipe*, 113 S. Ct. at 2291 (citation omitted). However, as pointed out by Justice O'Connor:

> [T]he Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because "pension plans [have] long been subject to federal regulation." *Ante* at

> 2291. Surely the employer that joined a multiemployer plan *before ERISA had been promulgated*—before Congress had made employers liable for unfunded benefits—might have a strong constitutional challenge to retroactive withdrawal liability.

Concrete Pipe, 113 S. Ct. at 2293 (O'Connor, J., concurring) (emphasis in original).

This case presents the question anticipated by Justice O'Connor in *Concrete Pipe*—how much prior regulation of an industry, and what kind of regulation, can defeat a claimant's reasonable expectations under the Taking Clause. Petitioners joined *and left* the 1950 W&R Fund well "before ERISA had been promulgated" in 1974. For the court below, the extraordinary federal seizure of the coal mines in 1946, under special wartime legislation,[18] sufficed to put the Petitioners on notice that they would be called nearly a half century later to fund lifetime health benefits for retired miners and their dependents for another half century into the future. App. 28a-29a. That sweeping view of Petitioners' "reasonable" expectations does not, however, square with *Connolly* or *Concrete Pipe*, in which the Court required the presence of existing regulation of the specific subject matter at issue. *Connolly*, 475 U.S. at 226-27 (noting prior passage of ERISA); *Concrete Pipe*, 113 S. Ct. at 2291 (same). "If the possibility of a decade-later legislative solution to a crisis makes the imposition of liability . . . constitutionally foreseeable, then the expectations prong of Taking Clause analysis ceases to exist, because legislation can always be foreseen."

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[18] The seizure was carried out under the Selective Training and Service Act of 1940, 54 Stat. 892, as amended by the War Labor Disputes Act, 57 Stat. 163. *See* Exec. Order No. 9728, 11 Fed. Reg. 5593 (May 21, 1946). The extraordinary nature of these powers and their limited availability only in time of war preclude their use to gauge the reasonableness of these Petitioners' expectations for government involvement, decades later, in retiree health benefits for the unionized subset of a single industry.

Unity Real Estate v. Hudson, 889 F. Supp. 818, 834 (W.D. Pa. 1995) (preliminarily enjoining assessment of Coal Act premiums).

The Court should grant certiorari to clarify the confused treatment of this *Connolly* factor by the lower courts. Under their reasoning, "expectations" are unimportant with respect to the Coal Act and the Taking Clause generally.

D. The court below wholly overlooked a bedrock principle of Taking Clause jurisprudence—the need for a reciprocal benefit to the party whose property is taken.[19] *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984); *Leonard & Leonard v. Earle*, 279 U.S. 392, 396 (1929); *Noble State Bank v. Haskell*, 219 U.S. 104, 110-11 (1911); *Village of Norwood v. Baker*, 172 U.S. 269, 278-79 (1898). These decisions all embody what Justice Holmes called the "average reciprocity of advantage" that the Taking Clause demands. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

For Petitioners, there is no "average reciprocity of advantage" under the Coal Act in exchange for their surrender of funds and of their reliance interest in contract repose. The court below believed that the Petitioners, *while they were in the business of mining coal*, benefited from a pool of available union miners. App. 28a. But that benefit, for which the miners were fully compensated at the time, ceased flowing to Petitioners when the mines closed. Now, three to four decades later, Petitioners must, in the name of remedying a financial crisis that was not of their making,[20] surrender substantial amounts of money for

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[19] A reciprocal benefit amounts to an "implicit in-kind compensation" for governmental action that *is* a taking. Epstein, TAKINGS 195 (1985), *quoted with approval in Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 n.5 (D.C. Cir. 1992).

[20] The essence of the Takings Clause "is simply the unfairness of making one citizen pay . . . to remedy a social problem that is

40-plus years without receiving one scintilla of benefit in return. Certainly Petitioners received no benefit from the labor of persons whom they never employed; and as to those whom they did employ, Petitioners ceased realizing any value decades ago, when they stopped mining coal after fully satisfying their mutually agreed-upon obligations to those employees. Unlike the signatories to the 1974 and later Agreements (who benefit substantially from the Coal Act's reallocation of their liabilities to total strangers, including Petitioners), and unlike companies who are still mining coal (who stand to benefit from more stable labor relations), Petitioners receive no "reciprocity of advantage" from the Coal Act.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit raises important federal questions under the Due Process and Taking Clauses. Petitioners respectfully request that their petition be granted.

Respectfully submitted,

Of Counsel:
JESSE H. CHOPER
Berkeley, California 94720
(510) 642-0339

ROSEMARY M. COLLYER
Counsel of Record
J. MICHAEL KLISE
TARA W. BLANCHARD
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

DAVID H. GOELLER
WILKINSON, GOELLER, MODESITT, WILKINSON & DRUMMY
333 Ohio Street
Terre Haute, Indiana 47808
(812) 232-4311
Attorneys for Petitioners

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none of his creation." *Pennell v. City of San Jose*, 485 U.S. 1, 23 (1988) (Scalia, J., concurring in part, dissenting in part).

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 95-1960, 95-2306

DAVON, INC., TEMPLETON COAL CO., INC., SHERWOOD-TEMPLETON COAL CO., INC., PRINCETON MINING CO., INC., and BERWIND CORP.,

Plaintiffs-Appellants,

v.

DONNA E. SHALALA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and its Trustees, MARTY D. HUDSON, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Terre Haute Division, Nos. 93 C 158 and 93 C 198;
John D. Tinder, Judge

Argued Nov. 3, 1995

Decided Jan. 25, 1996

Before CUMMINGS, CUDAHY and KANNE, Circuit Judges.

CUMMINGS, Circuit Judge.

This case involves challenges to the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* ("Coal Act"). Congress enacted the Coal Act to guarantee that retired coal miners and their families would receive health benefits for life. The Act was passed in response to a financial crisis that threatened the viability of the existing health benefit arrangement between miners and mining companies as well as the overall stability of the coal industry. The source of the financial crisis was simple: too many beneficiaries under the industry-wide health benefit plan and too few contributing employers. Thus when Congress passed the Coal Act, it mandated that all current and former coal operators contribute to a combined fund on a proportionate basis, including former coal operators that had not signed a collective bargaining agreement for health benefits since 1950. Plaintiffs in this case are five such former coal operators. None is presently in the coal industry and most have not mined coal for at least thirty years. All are required to pay premiums under the Coal Act because, at a minimum, they each signed a collective bargaining agreement in 1950. Plaintiffs argue that the reach-back financing provision of the Act is unconstitutional as applied to them under both the Due Process Clause and the Takings Clause of the Fifth Amendment. The district court disagreed and entered summary judgment against plaintiffs. We now affirm.

I.

The following is a relatively brief factual background to the present controversy. More exhaustive accounts are available. See *In re Chateaugay Corp.*, 53 F.3d 478, 481-486 (2d Cir.1995), certiorari denied, —— U.S. ——, 116 S.Ct. 298, 133 L.E.2d 204; *Templeton Coal Co. v. Shalala*, 882 F.Supp. 799, 805-810 (S.D.Ind.1995); *Bar-*

rick Gold Exploration, Inc. v. Hudson, 823 F.Supp. 1395, 1398-1401 (S.D.Ohio 1993).

A.

Background to the Coal Act

The Coal Act is Congress's solution to a national health benefit problem long in the making. In 1946, the United Mine Workers of America ("UMWA") staged a nationwide strike over the refusal of coal operators to create a health and retirement fund. President Truman nationalized the coal mines and ordered negotiations with the Secretary of the Interior. The result was a collective bargaining agreement known as the "Krug-Lewis Agreement" that established a broad outline for employer-sponsored health and welfare programs. The coal mines were returned to private control in 1947, and the first in a series of National Bituminous Coal Wage Agreements ("NBCWAs") between the UMWA and the Bituminous Coal Operators Association, Inc. ("BCOA"), a multi-employer association of coal producers, was agreed upon. NBCWAs governed the terms and conditions of employment in coal mines operated by BCOA members, as well as non-BCOA "me too" operators that agreed to be bound by the terms of the NBCWAs.

The 1950 NBCWA established the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W & R Fund"), which succeeded the then-governing 1947 UMWA Welfare and Retirement Fund. The 1950 W & R Fund was intended to provide benefits to working and unemployed miners, their spouses and dependent children under age 18, retired miners and their spouses, widows of deceased miners, and relatives of deceased miners who cared for the miners' orphaned children. The program included the payment of unlimited hospitalization and in-hospital medical care as well as disability, death, or retirement benefits. Signatory coal operators contributed to the Fund on a per-ton royalty basis at rates specified in successive NBCWAs or amend-

ments. Trustees of the Fund retained discretion over the amount and nature of benefits to be paid.[1] The Fund was the exclusive provider of health, pension, and other welfare benefits for UMWA active and retired miners and their dependents, and its operation remained essentially unchanged from 1950 through 1974.[2]

In 1974, the BCOA and the UMWA agreed to divide the 1950 W & R Fund into four separate multi-employer plans: two for pension benefits and two for other benefits. This was largely in response to the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), which mandated that pension plans be fully funded on an actuarial basis. The two non-pension plans were known as the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Trust") and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust"). The 1950 Benefit Trust provided health benefits to miners who retired before 1976 and their dependents, while the 1974 Benefit Trust provided health benefits to miners who were active, or who retired on or after January 1, 1976, and their dependents.

Economic difficulties that ultimately led to the Coal Act surfaced in the late 1970s. Several factors caused the restructuring of the UMWA Benefit Trust in 1978, including a significant reduction in the amount of coal produced under the NBCWAs, the retirement of a generation of miners, the rapid escalation of health care costs, and the steady increase in the number of "orphan" retirees—those whose employers either had gone out of

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[1] Plaintiffs point to numerous occasions from 1950 to 1960 on which the Trustees exercised their authority to terminate, decrease, or otherwise modify benefits.

[2] Subsequent to the 1950 agreement, NBCWAs were negotiated by the UMWA and the then-operating coal producers in 1955, 1956, 1958, 1964, 1966, 1968, and 1971. From 1950 to 1974, the Fund and its predecessors collected approximately $3.9 billion in contributions from coal operators and paid approximately $1.5 billion in hospital and medical care benefits, $283 million in survivors and other related benefits, and $2 billion in pension benefits.

business or had switched to non-UMWA labor. After a 111-day strike and tense negotiations, the UMWA and BCOA agreed to what would be the last restructuring of the UMWA benefit trusts. The 1978 NBCWA continued the multi-employer approach for providing health care benefits to persons who retired before January 1, 1976, but it provided that persons who retired on or after that date would receive health care benefits from single-employer plans maintained by the retirees' "last NBCWA signatory employer." The 1974 Benefit Trust was retained for miners who retired on or after January 1, 1976, and whose last signatory employers were no longer in business. The 1978 NBCWA also added "guarantee" and "evergreen" clauses, which obligated signatory operators to make sufficient contributions to ensure benefits and to continue making contributions after the expiration of the NBCWA.

The basic trust structure was maintained by subsequent NBCWAs in the 1980s, but economic difficulties continued and worsened. By 1990, the UMWA Benefit Trusts had incurred debts of over $100 million, and their funding from coal producers was decreasing faster than the beneficiary population. The crisis led to a 10-month strike at the Pittston Coal Company and threatened the stability of coal production as well as the economies of coal-producing states. As part of the settlement of the Pittston strike, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission") to make recommendations to assure the long-term viability of the 1950 and 1974 Benefit Trusts.

The Coal Commission issued its report in November 1990, documenting the financial crisis of the UMWA Benefit Trusts and stating that the primary culprit was the escalating cost of paying for "orphan" retirees whose last NBCWA signatory employer had either left the coal business or was otherwise not a contributing coal pro-

ducer. The Commission made findings and recommendations as follows: (1) that retired miners are entitled to health care benefits that were promised them and that such commitments must be honored; (2) that a statutory obligation to contribute to the trusts should be imposed on current and former signatories to NBCWAs; and (3) that mechanisms should be enacted to prevent the future dumping of retiree health care costs on the UMWA Trusts. The Coal Commission proposed two alternative methods for financing orphan retirees: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators; and (2) a private multi-employer fund financed by signatories to the 1978 and later NBCWAs, and, to provide benefits for orphaned retirees, further funded by all employers that were signatories to one or more NBCWAs in the past.

B.

The Coal Act

After the Coal Commission issued its report, Congress commenced hearings to consider its findings and recommendations. See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Finance Comm.*, 102d Cong., 1st Sess. (1991) ("*Senate Hearings*"). In October 1992, Congress passed the Coal Act as part of the Energy Policy Act of 1992 with the following stated purpose:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees of the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Pub.L. No. 102-486, § 19142(b). Congress found that the coal industry's existing system for funding retiree health benefits had to be modified "to identify persons most responsible for plan liabilities. . . ." *Id.* § 19142 (a). The Coal Act merged the 1950 and 1974 Benefit Trusts into the UMWA Combined Benefit Fund ("Combined Fund"). 26 U.S.C. § 9702(a)(2). The Combined Fund provides benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive and were receiving benefits from the 1950 or 1974 Trusts. 26 U.S.C. § 9703.

Congress adopted a financing arrangement similar to the Coal Commission's second alternative recommendation.[3] Every coal operator that signed NBCWAs is required to participate in the Combined Fund's financing. 26 U.S.C. § 9701(b), (c)(1). The task of assigning beneficaries under the Act was given to the Secretary of Health and Human Services ("Secretary"). 26 U.S.C. § 9706(a). Each signatory must pay premiums for its own former employees and their covered dependents, as well as a proportional share of the premiums for "orphan"

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[3] The parties disagree over whether the Coal Commission's second alternative proposal recommended a reach-back to 1950 signatories or only to 1978 signatories. Defendants cite the following language from the Commission as support for their statement that it recommended a reach-back to 1950 signatories:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts*, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator. (emphasis added by defendants).

We note only that this language is ambiguous and that it is therefore not clear whether Congress "reached-back" further than the Commission recommended. In any event, the question whether reaching back beyond 1978 signatories was rational subsumes the question whether it was rational to ignore the Coal Commission.

retirees whose employers have gone out of business. 26 U.S.C. § 9704(a)-(d). If a retiree worked for more than one signatory, he is assigned to the most recent that signed an NBCWA in 1978 or after. 26 U.S.C. § 9706 (a)(1)-(2). If none signed in or after 1978, the retiree is assigned to the pre-1978 signatory that employed him for the longest period prior to 1978. 26 U.S.C. § 9706 (a)(3).

C.

The Plaintiffs

The plaintiffs in this case are companies that signed the 1950 NBCWA. Several plaintiffs also signed successor NBCWAs in the 1950s and 1960s; however, none signed the 1974 NBCWA nor any subsequent NBCWA. Because the Coal Act's financing provision reaches back to 1950 NBCWA signatories, each plaintiff has been assigned beneficiaries under the Act and as such is obligated to pay premiums to the Combined Fund. This is a consolidated appeal arising out of two separate but related suits by plaintiffs. The first complaint was filed by Templeton Coal Company ("Templeton"), Sherwood-Templeton Coal Company ("Sherwood"), Princeton Mining Company ("Princeton"), and Berwind Corporation ("Berwind"). Collectively, we will refer to these plaintiffs as the "Templeton Employers." The relevant background of each follows:

(1.) Templeton. Incorporated in 1920, Templeton closed its last mine in 1954. Currently, it engages in business that is unrelated to coal production. Templeton signed the 1950 NBCWA and its amendments in 1951 and 1952; it stopped participating in the UMWA Funds in 1954. The Secretary assigned 39 beneficiaries to Templeton at a first-year cost of $138,131.35.[4]

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[4] The figures for assigned beneficiaries are for the first year only. In some cases, the companies were assigned additional beneficiaries in subsequent years.

(2.) Sherwood. Incorporated in 1929, Sherwood, a wholly owned subsidiary of Templeton as of 1967, sold its last mine in 1960 and is currently engaged in business unrelated to coal production. Sherwood signed the 1950 NBCWA and its amendments in 1951, 1952, 1955, 1956, and 1958; it last participated in the UMWA Funds in 1960. The Secretary assigned four beneficiaries to Sherwood at a cost of $15,147.22 for the first year.

(3.) Princeton. Incorporated in 1923, Princeton stopped mining coal in 1966 and is also currently engaged in non-coal activities. Princeton was a signatory to the 1950 NBCWA and subsequent amendments in 1951, 1952, 1955, 1956, and 1958; it participated in the UMWA Funds until 1966. Princeton was assigned 117 beneficiaries at a first-year cost of $419,325.17.

(4.) Berwind. Originally Berwind-White Coal Mining Company, it was a signatory to the 1950 NBCWA and its amendments in 1951, 1952, 1955, 1956, and 1958. Berwind closed its last mine in 1962, but in January 1963 it merged with another coal company and became a 98% shareholder of Reitz Coal Company; Reitz was a signatory to the 1968, 1971, 1974, 1978, and 1981 NBCWAs. Currently, Berwind owns the Berwind Natural Resources Corporation, which is the parent of several coal companies; these companies pay royalties to Berwind on the coal mined. The Secretary assigned by far the largest number of beneficiaries to Berwind among the plaintiffs —914 at a first-year cost of $3,227,727.96.

The second complaint was filed by Davon Incorporated ("Davon"). Davon's predecessor, the New York Coal Company, was engaged in coal mining from 1933 until 1954. During this time, it employed UMWA-represented miners and was signatory to the 1950 NBCWA and its 1951 and 1952 amendments.[5] New York Coal sold its

[5] Davon states in its brief that it has no records indicating that its predecessor signed any NBCWA. It noted that the Combined

coal mining business in 1954 to Sunnyhill Coal Company and agreed as part of the sale not to engage in the coal business. In 1957, New York Coal became Davon, Inc., through an asset purchase. Neither New York Coal nor its successor Davon has engaged in coal mining since 1954. The Secretary assigned 98 beneficiaries to Davon for a first-year cost of $327,428.80.

The beneficiaries assigned to each of the five plaintiff-companies consist of approximately 30 percent retired UMWA miners who worked for plaintiffs and 70 percent spouses and dependents of those miners. Plaintiffs point out that many of the beneficiaries assigned to them have only the most tenuous connection to the company. For example, some beneficiaries worked for less than a day at the contributing company. Nonetheless, the Coal Act requires plaintiffs to pay their health benefits for life. In addition, plaintiffs must also pay premiums for "orphan," or unassigned, miners and relatives. The contributions for unassigned beneficiaries, as stated above, are calculated based on the company's proportion of assigned beneficiaries. These contributions will continue until the last beneficiary dies.

D.

Proceedings Below

The Templeton Employers filed suit in the district court on September 2, 1993, challenging the constitutionality of the financing provisions of the Coal Act, 26 U.S.C. § 9704, under the Due Process Clause and the Takings Clause of the Fifth Amendment. The Combined Fund and its Trustees intervened to defend the validity of the statute, but on October 25, 1993, the district court issued

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Fund's only basis for concluding that New York Coal was a signatory from 1933 to 1954 was a computer list prepared by the Combined Fund. We are aware of no evidence, and Davon points to none, that the Secretary erred in assigning beneficiaries to Davon.

an injunction against the Secretary and the Trustees enjoining them from enforcing the Coal Act. On November 3, 1993, Davon filed a complaint against the Secretary and the Combined Fund seeking the same relief as the Templeton Employers. After conducting a hearing, the district court on November 18, 1993, denied Davon's request for injunctive relief and vacated the October 25 injunction in the Templeton Employers' case *sua sponte*. *Templeton Coal Co. v. Shalala*, 855 F.Supp. 990 (S.D. Ind.1993). The court said only that "[w]hen originally issuing the injunction, the court was reading the Due Process and Takings cases too narrowly." *Id.* at 999 n. 10.

The parties subsequently filed cross-motions for summary judgment. On April 4, 1995, the district court denied plaintiffs' motion and granted the motions of the Secretary and the Trustees. *Templeton Coal*, 882 F.Supp. at 799. The district court first rejected plaintiffs' argument that the Coal Act is a retroactive statute subject to heightened scrutiny:

> Because the Coal Act does not write on an historical blank slate, but merely provides for a prospective statutory continuation of collectively-bargained health care premium payments for UMWA miners dating back nearly half a century, the Act imposes neither "new" nor "retroactive" legal duties on Plaintiffs in the constitutional sense.

Id. at 815. Ultimately rejecting plaintiffs' due process argument, the district court stated, "Plaintiffs did work in the [coal] industry at one time. This fact . . . would be enough to keep Plaintiffs' connection to the current financial obligation from being considered arbitrary or void of reason." *Id.* at 821. The court also rejected plaintiffs' Takings Clause argument, primarily because it considered unreasonable any expectation by the plaintiffs that they would never again be responsible for health benefits for retired UMWA miners, especially in light of

the continued provision of such benefits and the pervasive nature of government regulation in every facet of the coal mining industry. *Id.* at 826.

II.

On appeal, the Templeton Employers and Davon argue that the district court erred in granting defendants' motion for summary judgment. Specifically, they argue that the reach-back financing provision of the Coal Act is unconstitutional as applied to them under the Due Process and Takings Clauses of the Fifth Amendment. We will address these arguments in turn. This Court reviews the grant of summary judgment *de novo*. *East Food & Liquor, Inc. v. United States*, 50 F.3d 1405, 1410 (7th Cir. 1995).

A.

Due Process

The constitutional analysis necessarily begins with a discussion of the appropriate standard of review. The Coal Act is "a classic example of an economic regulation —a legislative effort to structure and accommodate 'the burdens and benefits of economic life.' " *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83, 98 S.Ct. 2620, 2636, 57 L.Ed.2d 595 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752). Because the Coal Act is an economic regulation that burdens no fundamental rights, it is subject only to the minimum scrutiny, rational basis test:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Turner Elkhorn, 428 U.S. at 15, 96 S.Ct. at 2892. Substantive due process requires only that economic legisla-

tion be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601.

In mounting a due process challenge to the Coal Act, plaintiffs in this case must maneuver through "unusually inhospitable legal terrain." *In re Chateaugay Corp.*, 53 F.3d 478, 487 (2d Cir. 1995) (rejecting due process challenge to the Coal Act), certiorari denied, —— U.S. ——, 116 S.Ct. 298, 133 L.Ed.2d 204. As the Second Circuit noted, since the 1935 decision in *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, the Supreme Court has failed to invalidate a federal economic regulation on substantive due process grounds. 53 F.3d at 487 (citing numerous Supreme Court cases upholding economic regulation). Instead, the Court has increasingly deferred to congressional judgment on economic policy, explicitly acknowledging the presumption in favor of constitutionality and reviewing only for rationality. As stated in *Duke Power*, that Congress's economic choices "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." 438 U.S. at 83-84, 98 S.Ct. at 2636.

Plaintiffs argue that we should subject the Coal Act to heightened scrutiny because it is an economic regulation that is applied retroactively. Retroactive legislation, they argue, imposes an added burden for judicial review, and such regulations are unconstitutional if they produce "harsh and oppressive" results. Plaintiffs' argument has two important components. First is the question whether the Coal Act is retroactive legislation; the second component is how retroactivity changes the due process analysis. The parties make much over whether the Coal Act is retroactive. We agree with plaintiffs that the Coal Act, as applied to them, is retroactive: "[E]very statute,

which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective." *Landgraf v. USI Film Prods.*, —— U.S. ——, ——, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229. More succinctly, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* Clearly that is the case here. The Coal Act attaches new legal consequences—mandatory payments to the Combined Fund—for the act of participating in some previous NBCWA. Accord *Chateaugay*, 53 F.3d at 489 (Coal Act has retroactive effect); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832, 836-837 (6th Cir.1995) (same), certiorari denied, —— U.S. ——, 116 S.Ct. 64, 133 L.Ed.2d 26. The district court's statement that the "Coal Act is simply not 'retroactive' for purposes of due process analysis," *Templeton Coal*, 882 F.Supp. at 813, is likely directed at the legal consequences of calling the statute "retroactive" rather than the actual reach of the statute.

The second component of plaintiffs' argument is their assertion that the retroactive nature of the Coal Act subjects it to greater scrutiny under the Due Process Clause. Unfortunately for plaintiffs, Supreme Court precedent could not be more clearly contrary to their position.[6] In

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[6] Plaintiffs argue that retroactive legislation such as the Coal Act is unconstitutional if it is "harsh and oppressive." They claim that the "harsh and oppressive" inquiry is a multi-factor analysis, focusing on, for example, the length of period affected, the foreseeability of the legislation, the disruption to settled expectations, and whether a party relied on the state of the law at the time it acted. In support, plaintiffs cite a host of cases, all of which are either misconstrued by plaintiffs or inapposite to this case. Plaintiffs' citation to cases addressing the constitutionality of revenue statutes is misplaced. The "harsh and oppressive" standard originated in *Welch v. Henry*, 305 U.S. 134, 147, 59 S.Ct. 121, 126, 83 L.Ed. 87, and has since been applied in other revenue statute cases,

Turner Elkhorn, supra, the Supreme Court upheld against constitutional attack the Black Lung Benefits Act of 1969, which in part required compensation for disabilities caused during employment prior to the statute's enactment. Plaintiffs cite the following language from *Turner Elkhorn* in support of their argument:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

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e.g., United States v. Hemme, 476 U.S. 558, 568-572, 106 S.Ct. 2071, 2077-2080, 90 L.Ed.2d 538, but the Court has made clear that the "harsh and oppressive" analysis as applied to economic legislation "does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn.*" *Gray,* 467 U.S. at 733, 104 S.Ct. at 2720; see also *United States v. Carlton,* —— U.S. ——, ——, 114 S.Ct. 2018, 2022, 129 L.Ed.2d 22; *Furlong v. C.I.R.,* 36 F.3d 25, 26-27 (7th Cir.1994). Cases from this Circuit confirm that when addressing economic legislation, the "harsh and oppressive" standard is merely a search for rationality per *Turner Elkhorn* and its progeny. *See Rhinebarger v. Orr,* 839 F.2d 387, 389 (7th Cir.1988), certiorari denied, 488 U.S. 824, 109 S.Ct. 71, 102 L.Ed.2d 48; *Peick v. Pension Benefit Guar. Corp.,* 724 F.2d 1247, 1269 (7th Cir.1983), certiorari denied, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855.

In support of their argument that the "harsh and oppressive" standard encompasses a multi-factor test, plaintiffs read too much into several Supreme Court and Seventh Circuit cases. None of the cases cited applies a multi-factor test like the one plaintiffs propose and most are taken from revenue statute cases—cases that the Supreme Court has recently clarified should be governed by the rationality standard. See *Carlton, supra.* In addition, several of the factors alleged to be relevant are taken from cases interpreting the Contract Clause, even though the Supreme Court has explicitly stated that "federal economic legislation . . . is not subject to constraints coextensive with those imposed upon the States by the Contract Clause. . . ." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.* 508 U.S. 602, 113 S.Ct. 2264, 2289, 124 L.Ed.2d 539; see also *Gray,* 467 U.S. at 733, 104 S.Ct. at 2719.

428 U.S. at 16-17, 96 S.Ct. at 2893. However, plaintiffs ignore the true import of the Court's language. Far from saying that the retroactive aspects of legislation are subject to heightened scrutiny, the Court stated that both the retroactive and the prospective aspects are subject to the test of due process. The test of due process in assessing economic legislation is rationality. Thus the Court went on to inquire into the rationality of imposing liability for past actions. It concluded as follows:

> We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a *rational* measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . .

Id. at 18, 96 S.Ct. at 2983 (emphasis added). There can be no doubt about the Court's deference to Congress regarding retroactivity:

> [I]t is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators . . . or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the wisdom of Congress' chosen scheme. . . . It is enough to say that the Act approaches the problem of cost spreading *rationally* . . . .

Id. at 18-19, 96 S.Ct. at 2894 (emphasis added).

That the same due process standard applies to retroactive economic legislation was confirmed in *Gray, supra.* In that case, the Court upheld the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), which was applied retroactively to employers withdrawing from pension plans up to five months prior to enactment. The Court elucidated the somewhat misleading language from *Turner Elkhorn* that "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retro-

spectively," stating that the burden to justify retroactivity in economic legislation "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Gray*, 467 U.S. at 730, 104 S.Ct. at 2718 (quoting *Turner Elkhorn*, 428 U.S. at 16-17, 96 S.Ct. at 2892). The Court once again confirmed the meaning of *Turner Elkhorn* and *Gray* in *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328, where it stated that the retroactive aspects of economic legislation, as well as the prospective aspects, must meet the due process test: "a legitimate legislative purpose furthered by rational means." *Id.* at 191, 112 S.Ct. at 1112.

Plaintiffs are correct that this Court must give additional consideration to the retroactive effects of the Coal Act; however, they are incorrect in asserting that we must look beyond the rationality of Congress's economic choices. The additional consideration required by *Turner Elkhorn*, *Gray*, and *Romein* is that the retroactive aspects of economic legislation must be justified *independently* of the prospective aspects. In other words, Congress must have an independent rational basis for making a law retroactive, even where the prospective aspects of the legislation are plainly rational. This methodology was meticulously employed in *Turner Elkhorn*. There the Black Lung Benefits Act was plainly rational as to current employees of existing mining companies, but the Court independently analyzed the rationality of spreading the costs to companies for injuries bred in the past, including companies out of the mining business. The Court found the retroactive portion of the Act rational because it imposed liability on companies that profited from the fruits of the injured miners' labor and because those companies might have taken steps in the past to minimize black lung dangers. 428 U.S. at 18, 96 S.Ct. at 2893.

Thus we must independently analyze the retroactive aspects of the Coal Act's financing provisions and deter-

mine whether Congress chose rational means to further its legislative purpose.[7] Congress certainly had several alternatives available to finance the Combined Fund. It could have restricted required contributions to the signatories of the latest NBCWA or, at the other extreme, raised funds from all existing coal companies or from general tax revenues. Congress also had several intermediate alternatives. For example, it could have reached back only to the 1978 NBCWA, which created the "guarantee" and "evergreen" clauses; to the 1974 NBCWA, which created the 1950 and 1974 Trusts; or to the 1950 NBCWA, which created the predecessor of all the trusts. In reviewing its final choice, we note that Congress "had absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 477, 105 S.Ct. 1441, 1457, 84 L.Ed.2d 432. We may find rationality so long as a rational basis exists for the statute's retroactivity, regardless of whether Congress actually considered the basis. This is so because "it is entirely irrelevant for constitutional purposes whether the

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[7] The legitimacy of the legislative purpose is not seriously at issue in this case. The Coal Act's stated purposes are to "remedy problems with the provision and funding of health care benefits" under the 1950 and 1974 Trusts, to establish "sufficient operating assets for such plans," and to ensure "the delivery of health care benefits to the beneficiaries of such plans." Pub.L. No. 102-486 § 19142(b). Given the importance of coal to the economy, the likelihood of further labor unrest, the serious financial problems with the 1950 and 1974 Trusts, and the importance of health care provisions to approximately 100,000 retired coal miners, the legitimacy of Congress's legislative purpose is easily established by defendants. Plaintiffs' only attack involves questioning Congress's "real" motives in passing the the Coal Act and calling the Coal Act a "special-interest deal." Plaintiffs' attack is based only on speculation; regardless, it matters not for constitutional purposes whether Congress was actually motivated by the stated reasons for the legislation. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, ——, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211.

conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, ——, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211. The existence of several such rationales for the Coal Act demonstrates that Congress's decision to reach back to 1950 NBCWA signatories was far from arbitrary.

First, every NBCWA signatory company profited from the labor of its retired miners. Plaintiffs in this case each employed at some time retired miners covered under the Coal Act and thus benefitted from their labor. Congress could rationally have concluded that a company which profited in the coal industry from the labor of retired miners should be held proportionally responsible for guaranteeing health benefits. When viewed in this light, it would have been irrational to draw the line anywhere other than 1950 NBCWA signatories.

Plaintiffs respond that the Coal Act forces them to finance benefits for "orphan" retirees who never worked for them and thus never benefitted their mining operations. Given that plaintiffs benefitted from the labor of retired mine workers the same as companies still operating in the coal industry, it was rational for Congress to require all contributing coal companies to share responsibility for "orphan" beneficiaries. The essential premise of the Coal Act, as the district court noted, is proportionality. Plaintiffs are assigned "orphan" beneficiaries proportional to their overall participation in the Combined Fund, and the Coal Act makes provision for proportionally reducing plaintiffs' responsibility for "orphan" retirees as statutory transfers are received from the 1950 Pension Fund and the Abandoned Mine Reclamation Fund. 26 U.S.C. § 9705(a)(3)(B) & (b)(2). These provisions, which effectively mitigate the burden of operators to fund "orphan" retirees, further demonstrate the rationality of Congress's financing scheme. We cannot say that Congress's scheme of proportionality is arbitrary or irrational.

Second, every NBCWA signatory company shared some responsibility in creating a legitimate expectation among miners of lifetime health benefits. Imposing liability on companies that have profited from the retirees' labor was found rational in *Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. at 2893. Every signatory company, including plaintiffs, participated in the creation and development of a multi-employer health benefit program that provided lifetime health benefits for retirees for almost fifty years. Congress could rationally have concluded that such participation led to a legitimate expectation of lifetime health benefits that should be honored under the Coal Act. Again, in this light, it would have been arbitrary to draw the line anywhere other than at all NBCWA signatories. Plaintiffs respond that it was not until the 1974 NBCWA and the "guarantee" and "evergreen" clauses of the 1978 NBCWA that miners were promised lifetime health benefits—promises that plaintiffs never made. Therefore, they argue, it was irrational for Congress to require contributions from pre-1974 signatories.[8] But the fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefis. The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s, even though it is not explicit in any NBCWA until 1974. Even if no such promise was made, every NBCWA contributed to the expectation by creating a continuous mechanism for providing UMWA multi-employer-sponsored health benefit

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[8] It is on this basis that plaintiffs here distinguish themselves from the plaintiffs who unsuccessfully challenged the Coal Act in the Second Circuit. See *Chateaugay, supra.* Plaintiffs in *Chateaugay* were signatories to the 1974 NBCWA. However, as we discuss in the text, the rationality of Congress's decision to reach back further than 1974 (a "Super" reach-back, as plaintiffs like to call it) can be justified independently from its decision to reach companies that made contractual promises of lifetime health benefits. As such, distinguishing *Chateaugay* matters little.

plans. While individual coal operators such as plaintiffs have come and gone, UMWA retirees have received continuous health coverage paid for by successive UMWA benefits trusts. Plaintiffs were part of this tradition and can rationally be said to have contributed to a reasonable expectation of lifetime health benefits. Their withdrawal from participation in the trusts helped create the financial crisis that resulted in the Coal Act. "It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States v. Sperry Corp.*, 493 U.S. 52, 65, 110 S.Ct. 387, 396, 107 L.Ed.2d 290.

In arguing that the Coal Act should not have reached back beyond the 1974 or 1978 NBCWAs, plaintiffs state that the Act requires them to fulfill contractual obligations to which they were not a party. They contend that they have fulfilled all of their obligations under the NBCWAs they signed. This argument assumes that the Due Process Clause prohibits Congress from imposing obligations on employers beyond those voluntarily assumed by contract. The assumption is simply wrong. In rejecting a due process challenge to the retroactive withdrawal liability provision of the MPPAA, the Supreme Court in *Gray* stated that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" and that "this is true even though the effect of the legislation is to impose a new duty or liability based on past acts." 467 U.S. at 729-730, 104 S.Ct. at 2718 (quoting *Turner Elkhorn*, 428 U.S. at 15-16, 96 S.Ct. at 2892-2893). Plaintiffs' contractual obligations under the NBCWAs they signed in no way define the outer limit of Congress's power to legislate consistently with the Due Process Clause.[9] They

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[9] Plaintiffs contend that Congress must find a causal connection between their actions prior to leaving the coal industry and the financial crisis that led to the Coal Act. Although this Court

ignore the significant distinction between a finding of a contractual promise of lifetime benefits and a legislative finding that plaintiffs bear some degree of responsibility. The former is not a prerequisite of the latter. Congress had a rational basis for finding that plaintiffs' responsibility went beyond their contractual promises. See *Concrete Pipe*, 508 U.S. at ——, 113 S.Ct. at 2289 (rejecting argument that rationality review is confined by the extent of a party's contractual obligations).

Third, mandatory contributions from all NBCWA signatory companies were necessary to secure adequate funding for the Combined Fund. Congress could rationally have concluded that restricting contributions to anything less than all NBCWA signatories would have left the Combined Fund inadequately funded and unable to provide health benefits to all retirees. Congress heard testimony to this effect. See *Senate Hearings*, at 44-45, 279.

Fourth, restricting the statutory obligation to fewer than all NBCWA signatory companies could have resulted in economic conflict in the coal industry. Congress could rationally have concluded that restricting contributions to post-1974 signatories would have placed such a great financial burden on existing coal companies as to cause economic conflict and threaten the financial stability of the national bituminous coal industry. Additionally, allowing the demise of the multi-employer health care system could have had a devastating effect on the economies of the major coal-producing states. Congress at

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believes that Congress could rationally find such a connection, plaintiffs cite no binding authority for their proposition, relying instead on statements made in Supreme Court concurrences and dissents. See, *e.g.*, *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 229, 106 S.Ct. 1018, 1028, 89 L.Ed.2d 166 (O'Connor, J., concurring). Even the statements relied upon by plaintiffs ask only that courts look for rationality; regardless, they are taken from cases interpreting the Takings Clause rather than the Due Process Clause.

least had a rational basis, given events such as the 1946 strike and the Pittston strike, to think so.

Based on the foregoing, we conclude that the retroactive financing scheme of the Coal Act is a rational means to achieve legitimate legislative purposes. Davon argues that the Coal Act is not rational as applied to it specifically because it purchased the assets of New York Coal after that company had left the coal industry. But the aforementioned rationales apply with equal force to an asset purchaser. Through the asset purchase, Davon benefitted from the profits obtained by New York Coal with its employment of miners. Further, participation by as many signatory companies as possible was necessary both to ensure adequate funding and avert an economic crisis in the coal industry. Thus Congress could rationally have chosen to ignore changes in corporate form that would allow a company to avoid responsibility for retired miners and the Coal Act's required contributions.

Plaintiffs make several additional arguments that, if accepted, would render the Act unconstitutional despite our finding of rationality. First, plaintiffs argue that the retroactive financing provision reaches back an unprecedented length of time and that the length of the period affected is an especially "significant factor" in the due process inquiry. We agree with the Second Circuit that there is no support for the proposition that the degree of retroactivity itself violates the Due Process Clause. *Chateaugay*, 53 F.3d at 491. Such a proposition would ignore precedent upholding the unlimited retroactive reach of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), see, *e.g.*, *United States v. Monsanto Company*, 858 F.2d 160, 173-174 (4th Cir.1988), certiorari denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019. Further, as the Second Circuit noted, the degree of retroactivity imposed by the Coal Act is not noticeably great when compared to the Black Lung Benefits Act upheld in *Turner Elkhorn:*

> As with CERCLA and the Black Lung Benefits Act, . . . the Coal Act triggers current and future liabilities on the basis of past actions, in this case the hiring and firing of workers and the signing of [an NBCWA]. The Coal Act contains no requirement that signatory operators pay for health benefits delivered prior to the effective date of the statute. Thus, the financial impact of the Coal Act on assigned operators is strictly prospective: only the weight and duration of the funding burdens vary according to past acts.

53 F.3d at 491. Congress can make a statute retroactive for as long a period as is rational. We find nothing irrational *per se* about the length of retroactivity in the Coal Act.

Plaintiffs also argue regarding the length of retroactivity that while due process can tolerate a short retroactive period necessary to implement legislation, it cannot tolerate a lengthy retroactive period in which a "wholly new" obligation is imposed. For this proposition plaintiffs cite *Carlton, supra,* which sustained the retroactivity of a Tax Code amendment because it was not a "wholly new tax." As our decision in *Estate of Ekins v. C.I.R.* demonstrates, the "wholly new tax" concept is unique to cases addressing revenue statutes and has no application here. 797 F.2d 481, 484 (7th Cir.1986). Further, the Supreme Court has made clear that standards articulated in revenue statute cases, when applied to economic legislation, are no different than the *Turner Elkhorn* rationality standard. *Gray*, 467 U.S. at 733, 104 S.Ct. at 2719.

Next, plaintiffs argue that the retroactive financing provision of the Coal Act imposes an unforeseeable liability on them. The liability was unforeseeable, they argue, because their participation in collective bargaining agreements occurred so far in the past and because their contractual obligations during that period were much more limited than the obligations imposed by the Coal

Act. As such, their foreseeability argument is little more that reiteration. Nonetheless, plaintiffs cite no authority indicating that foreseeability is a due process requirement for retroactive legislation; thus we have searched only for a rational basis. In the same vein is plaintiffs' argument that the Coal Act upsets their settled expectations and therefore offends due process. Even assuming the statute upset their expectations, the Supreme Court has said that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," and "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Turner Elkhorn*, 428 U.S. at 15-16, 96 S.Ct. at 2892-2893.[10]

We conclude that the Coal Act's retroactive financing provision challenged by plaintiffs easily passes the due process rationality test. Our conclusions are consistent with every other court that has addressed the issue. See *Chateaugay, supra; Barrick Gold, supra; Unity Real Estate Co. v. Hudson*, 889 F.Supp. 818 (W.D.Pa.1995); *In re Blue Diamond Coal Co.*, 174 B.R. 722 (E.D.Tenn. 1994); *Lindsey Coal Mining Co. Liquidating Trust v. Shalala*, 901 F.Supp. 959 (W.D.Pa.1995).

B.

Takings

The Takings Clause of the Fifth Amendment—"nor shall private property be taken for public use, without just compensation"—prohibits the government "from forcing some people alone to bear public burdens which, in

[10] Plaintiffs further argue that lack of timely notice of impending liability under the Coal Act violates due process. This is nothing more than their unforeseeability and settled-expectations arguments combined. They offer no authority, and we have uncovered none, that timely notice is a due process requirement for retroactive economic legislation. Thus the argument does not alter our conclusion.

all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554. In the field of economic legislation, the Supreme Court has noted that "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166. In assessing the merits of plaintiffs' constitutional argument, we are to conduct an "ad hoc" factual inquiry into the particular circumstances of this case, attaching "particular significance" to three factors: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Id.* at 224-225, 106 S.Ct. at 1026 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631).[11]

The first *Connolly* factor turns on the question of proportionality. The *Connolly* Court, in addressing the withdrawal liability provision of the MPPAA, stated that "the assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions." 475 U.S. at 225, 106 S.Ct. at 1026. The Court concluded,

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[11] Although plaintiffs do not raise the issue on appeal, defendants note in their brief that a threshold jurisdictional question must be answered: whether the district court could entertain plaintiffs' request for injunctive relief, given the fact that the Takings Clause "does not forbid takings" but merely requires compensation. See *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 673 (7th Cir.1992), certiorari denied, 506 U.S. 820, 113 S.Ct. 68, 121 L.Ed.2d 34. We agree with the Second Circuit's reasoning on this issue, *Chateaugay*, 53 F.3d at 491-493, and find no impediment to our review of the district court's Takings Clause decision.

> There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

Id. at 226, 106 S.Ct. at 1026-1027. Finding an employer's withdrawal liability not to be "out of proportion to its experience with the plan," the Court again upheld the MPPAA in *Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, ——, 113 S.Ct. 2264, 2291, 124 L.Ed.2d 539. The important question, therefore, is whether the basis for regulating plaintiffs under the Coal Act—their participation in prior NBCWAs—is proportional to the economic impact caused by the Act. The Coal Act's financing scheme is based on proportionality. The Act assigns beneficiaries based on the number of retirees employed by the former coal operator, 26 U.S.C. §§ 9704(a)-(c), and it assigns "orphan" retirees on a proportional basis as well. 26 U.S.C. § 9704(d). Thus the district court correctly concluded that plaintiffs' liability under the Act is directly related to their prior status as NBCWA signatories. In addition, the Coal Act takes steps to reduce the economic burden on assigned operators by requiring transfers from the UMWA Pension Plan and the Abandoned Mine Reclamation Fund. 26 U.S.C. § 9705. The Supreme Court has noted the significance of statutory efforts to mitigate the economic impact on individual employers. *Connolly*, 475 U.S. at 225-226, 106 S. Ct. at 1026-1027.

Rather than arguing proportionality, plaintiffs' primary contention focuses on the language of *Connolly* that requires "*experience* with the plan." They point out that the plans which the Coal Act merged into the Combined Fund did not exist when they were in the coal industry; rather, their experience was with different NBCWAs from much earlier and not with the 1950 and 1974 Benefit

Trusts that were merged into the Combined Fund. Thus they claim that the liability imposed on them will always be out of proportion to their experience with the plans. As noted above, the consecutive NBCWAs created a continuous multi-empolyer scheme for providing health benefits from approximately 1950 to the present. Each of the plaintiffs participated in at least one of the NBCWAs since 1950 and thus had experience with the multi-employer plans. Plaintiffs' argument regarding experience, rather than proportionality, is only persuasive if we accept the premise that the multi-employer plans of 1974 and after are sufficiently different from prior NBCWAs such that experience with the former does not constitute experience with the latter. Indeed, plaintiffs distinguish the Second Circuit's rejection of the Takings Clause claim because plaintiffs in that case participated in the 1974 NBCWA and later plans that promised lifetime benefits. See *Chateaugay, supra.* We find the distinction wholly unpersuasive. Each consecutive NBCWA, including those after 1974, accomplished the same end—to provide benefits to miners until the next NBCWA—using the same means—funding on a multi-employer basis. Nothing radical happened in 1974. As we stated in the due process context, the promise of lifetime benefits was not an unforeseeable inclusion in an NBCWA; every coal operator that participated in the multi-employer plans contributed directly to the retirees' legitimate expectations of lifetime benefits. Plaintiffs' "experience with the plan[s]" that eventually became the Combined Fund is easily deduced on the facts of this case.

The second factor is the degree of interference with plaintiffs' "reasonable investment-backed expectations." *Connolly,* 475 U.S. at 226, 106 S.Ct. at 1027. The issue is whether plaintiffs had a "reasonable expectation that [they] would not be faced with liability for promised benefits." *Concrete Pipe,* 508 U.S. at ——-——, 113 S.Ct. at 2291-2292. They point to two bases for their reasonable expectations. First, they contend that no prior gov-

ernment interest could have forecast their liability under the Coal Act. It is certainly true that prior to the Coal Act the government had never mandated lifetime health benefits for retired coal miners. It does not follow, however, that the government showed no interest in the coal industry sufficient to put plaintiffs on notice. Federal intervention in the 1946 strike of the UMWA over the refusal of coal operators to create a health and retirement fund led to the Krug-Lewis Agreement. The Agreement, which established a broad outline for employer-sponsored health and welfare programs, resulted in the first NBCWA—a multi-employer plan that continued through amendment and renegotiation until passage of the Coal Act. This early event, affecting as it did the future of health benefits in the coal industry, demonstrated that stability in the coal mining industry was of national importance and that federal intervention to avoid instability was foreseeable. The absence of federal intervention when plaintiffs mined coal is more reasonably attributed to successful private collective bargaining than lack of government interest.

Second, plaintiffs point to the fact that they never promised lifetime benefits and thus did not expect to be held liable for such. Their expectations in this regard would have been unreasonable. The 1950 W & R Fund and its predecessors—as well as the early NBCWAs signed by plaintiffs and subsequent NBCWAs—provided continuous health benefits to miners for almost 30 years prior to the NBCWAs that expressly promised lifetime benefits. Thus plaintiffs' argument ignores the fact that they substantially participated in a system that provided continuous benefits and created legitimate expectations that such provisions would not cease. Any expectation that they could never be held liable for retired miners' health benefits, in light of their participation in the NBCWAs, was not reasonable.

We also note that the contractual promises made by plaintiffs in their collective bargaining agreements do not necessarily limit Congress's authority via the Takings Clause:

> "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them."
>
> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

Connolly, 475 U.S. at 223-224, 106 S.Ct. at 1025-1026 (citations omitted) (quoting *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-308, 55 S.Ct. 407, 415-416, 79 L.Ed. 885). The question is therefore limited to whether plaintiffs had reasonable expectations based on their contractual promises that they could not later be held liable for lifetime benefits. As we concluded above, their participation in the multi-employer plans would make any such expectation unreasonable.

Regarding the third and final factor—the character of the government action—we find the Coal Act indistinguishable from the MPPAA sustained in *Connolly* and *Concrete Pipe*. Like the Coal Act, the MPPAA does not permit the government to "physically invade or permanently appropriate any of the employer's assets for its own use." *Connolly*, 475 U.S. at 225, 106 S.Ct. at 1026. Rather, under the MPPAA the "interference with the property rights of an employer arises from a public

program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking requiring Government compensation." *Id.* (citing *Penn Central, supra*; *Turner Elkhorn, supra*). Plaintiffs attempt to distinguish the MPPAA on the basis that the employers held liable under that Act were "responsible" for the financial difficulties caused by plan withdrawal, whereas no causal connection exists between plaintiffs' actions and the funding crisis remedied by the Coal Act. However, the argument ignores the role of employers in creating the NBCWA funding crisis. When plaintiffs and other employers withdrew from the multiemployer plans, they left behind retired miners with legitimate expectations of lifetime benefits. As the number of employers continued to decline, the number of beneficiaries grew, and the result was a seriously underfunded health benefit program. Thus Congress passed the Coal Act, which, like the MPPAA, "adjusts the benefits and burdens of economic life to promote the common good. . . ." *Id.*

In addition, plaintiffs' argument regarding their lack of responsibility goes beyond debate about the character of the government program, which we take from the language of *Connolly* to be an inquiry into the form or nature of interference with private property. The Coal Act entails no physical intrusion of plaintiffs' property nor any permanent confiscation of assets for government use. As the Supreme Court stated,

> It is well settled that a " 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 n. 18, 107 S.Ct. 1232, 1244 n. 18, 94 L.Ed.2d 472 (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659).

In conclusion, we find that all three of the *Connolly* factors demonstrate that the Coal Act does not unconstitutionally take property from plaintiffs without compensation.[12] When dealing with legislation adjusting the benefits and burdens of economic life that passes muster under the Due Process Clause, as the Coal Act does, "it would be surprising indeed to discover now" that Congress had nonetheless committed an unconstitutional taking. *Connolly*, 475 U.S. at 223, 106 S.Ct. at 1025. No surprises exist here.

III.

The Coal Act was a rational solution to a serious health benefit problem that threatened the stability of the bituminous coal industry in the United States. Requiring plaintiffs to participate in the solution because they once benefitted from the labor of coal industry retirees and once participated in collective bargaining agreements that fostered a legitimate expectation of lifetime health benefits was also a rational legislative decision. This Court does not sit in judgment on the wisdom of Congress's solution, only its rationality. *Turner Elkhorn*, 428 U.S. at 18-19, 96 S.Ct. at 2893-2894. Moreover, the existence of a proportional financing scheme, the lack of any reasonable expectation that plaintiffs would not be liable under the Coal Act, and the economic character of the Act, which only readjusts the benefits and burdens of economic life, preclude us from finding an unconstitutional taking. The district court properly entered summary judgement against plaintiffs, and its decision is therefore affirmed.

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[12] We are thus in agreement with all but one federal court to have decided the issue. See *Chateaugay, supra; Barrick Gold, supra; Blue Diamond, supra; Lindsey Coal, supra.* But see *Unity Real Estate Co. v. Hudson*, 889 F.Supp. 818 (W.D.Pa.1995) (finding unconstitutional taking).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: January 25, 1996

BEFORE: Honorable WALTER J. CUMMINGS,
Circuit Judge

Honorable RICHARD D. CUDAHY,
Circuit Judge

Honorable MICHAEL S. KANNE,
Circuit Judge

Nos. 95-1960 and 95-2306

DAVON, INC., TEMPLETON COAL CO., INC., SHERWOOD-TEMPLETON COAL CO., INC., PRINCETON MINING CO., INC., and BERWIND CORP.,
Plaintiffs-Appellants

v.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and its TRUSTEE, MARTY D. HUDSON, *et al.*,
Defendants-Appellees

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division
No. 93 C 198, and 93 C 158 John D. Tinder, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. INDIANA
Terre Haute Division

No. TH 93-158-C-T/H

TEMPLETON COAL COMPANY, INC., SHERWOOD-TEMPLETON COAL COMPANY, INC., PRINCETON MINING COMPANY, and BERWIND CORPORATION,

Plaintiffs,

v.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services,

Defendant.

UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND and its TRUSTEES, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O.S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD,

Intervenor-Defendants.

April 4, 1995

MEMORANDUM ENTRY REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

TINDER, District Judge.

This matter comes before the court upon cross motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The court, having considered the submissions and briefs of the parties, finds that Plaintiffs' motion for summary judgment should be DENIED, and Defendants' cross motions for summary judgment should be GRANTED.

I. Factual Background and Procedural History [1]

As noted when addressing Plaintiffs' request for a preliminary injunction, this suit [2] involves a challenge to the constitutionality of a piece of federal legislation affecting the funding of health care benefits for coal industry retirees. The suit is timely in the sense that, in very recent years, Americans have undertaken a continuing public debate regarding health care costs and funding in this country. The challenged statutory scheme is the method chosen by Congress to allocate health insurance costs for one significant segment of the work force. The outcome of this suit will have no direct bearing on the focus of the broader health care debate. Nonetheless, the suit reflects the types of dilemmas facing workers and their dependents, employers and the nation's lawmakers as they address these difficult issues. The court finds, and the parties agree, that no genuine issue of material fact exists which would preclude summary judgment in the case at bar.

Plaintiffs in this suit are four companies that were previously involved in the coal mining business. They each were signatories to collective bargaining agreements with the United Mine Workers of America ("UMWA") in the 1950s and 1960s. Specifically, Plaintiffs Templeton Coal Company, Inc. ("Templeton"), Sherwood-Templeton Coal Company, Inc. ("Sherwood"), and Princeton Mining Company, Inc. ("Princeton") bargained with the UMWA through the Indiana Coal Operators' Associa-

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[1] For a concise explanation of the historical underpinnings of the case at bar, see *Barrick Gold Exploration, Inc. v. Hudson*, 823 F.Supp. 1395, 1398-1401 (S.D.Ohio 1993), *aff'd*, 47 F.3d 832 (6th Cir.1995).

[2] The court notes that this case is not unique. There have been a number of challenges raised in other courts, similar in nature to the case at bar, to the statutory scheme in question. *Barrick Gold*, 823 F.Supp. at 1395; *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 163 B.R. 955 (S.D.N.Y.1993). *See also Unity Real Estate Co. v. Hudson*, No. 93-1802 (W.D.Pa.).

tion ("ICOA"), an independent multiemployer baraging association. Plaintiff Berwind Corporation ("Berwind") (formerly known as Berwind-White Coal Mining Company) bargained with the UMWA through the Central Pennsylvania Coal Producers' Association. The Bituminous Coal Operators' Association ("BCOA"), a multiemployer bargaining association formed by many of the UMWA coal mine operators, was the primary negotiator with the UMWA after 1951. Berwind was a member of the BCOA between 1955 and 1962. The other three Plaintiffs were never BCOA members, but shadowed the BCOA's activities by membership in ICOA, a similar multiemployer bargaining association.

All four Plaintiffs were signatories to the 1950 National Bituminous Coal Wage Agreement ("NBCWA") and subsequent amendments thereto in 1951 and 1952. The NBCWA was also amended in 1955, 1956, 1958, 1964 and 1966, but Plaintiffs' connections to those agreements after 1952 varied. Templeton ceased mining operations prior to the 1955 Amendment and consequently was not a signatory to it or any subsequent amendments to the NBCWA. Sherwood and Berwind were signatories to the 1955, 1956 and 1958 Amendments. Sherwood ceased mining operations with UMWA miners in 1960. Berwind ceased coal mining altogether in 1962. Thus, Sherwood and Berwind did not sign the 1964 Amendments or any subsequent NBCWA. Princeton signed all the amendments through 1964, but ceased mining before the 1966 Amendment and did not sign any subsequent NBCWAs.

The enactment of the Coal Industry Retiree Health Benefit Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, 3036-3056 ("Coal Act"), occurred in October 1992. The Coal Act was subsequently codified at 26 U.S.C. §§ 9701 to 9722 as part of the Energy Policy Act of 1992. The Coal Act subtantially affects Plaintiffs, who seek a judgment declaring that it violates the Due Process and Takings Clauses of the United States Constitution as applied to them. U.S. CONST. amend. V.

The 1950 NBCWA established the UMWA Welfare and Retirement Fund of 1950 ("1950 W & R Fund"). By the time Plaintiffs ceased mining coal with UMWA-represented employees, they each had fully complied with their obligations to contribute to the 1950 W & R Fund. The 1950 W & R Fund was created as an irrevocable trust under Section 302(c) of the Labor Management Relations Act of 1947. 61 Stat. 136. According to the 1950 NBCWA, the 1950 W & R Fund was to provide "benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness . . . [and] benefits on account of sickness, temporary disability, permanent disability, death or retirement." (Pls.' Ex. 5 (1950 NBCWA) at 136.) Sole discretion regarding the scope and duration of the benefits that employees might receive as a result of the 1950 W & R Fund belonged to the trustees of the 1950 W & R Fund. The principal obligation of the mine operator signatories to the 1950 NBCWA, including Plaintiffs, was to contribute into the 1950 W & R Fund thirty cents per ton of coal mined. The duration of this obligation continued for the life of the agreement.

None of the amendments to the NBCWA from 1951 to 1964 changed the terms regarding the provision of health benefits to retirees under the 1950 NBCWA, except that the 1952 Amendment increased the per-ton contribution to forty cents, which carried over to the succeeding agreements. (Pls.' Ex. 7 (1952 NBCWA) at 173.) The 1964 Amendment added a requirement that eigthy cents per ton be contributed for coal purchased from non-UMWA operators. (Pls.' Ex. 11 (1964 NBCWA).)

Subsequent NBCWAs through 1974 maintained the general elements of the 1950 W & R Fund as the exclusive provider of health and other welfare benefits for both active and retired UMWA miners and their dependents. The first significant change occurred in the 1971 NBCWA when the trustees were directed to extend benefits at levels

set by the BCOA and the UMWA, rather than at levels determined by the trustees as was previously done. (Pls.' Ex. 35 (1971 NBCWA) at 99.) Substantially more radical changes developed as a result of the 1974 NBCWA. That agreement converted the 1950 W & R Fund into an entity known as the UMWA 1950 Pension Trust. (Pls.' Ex. 37 (1974 NBCWA) at 84.) The 1974 NBCWA also created two other plans relevant to this proceeding:[8] the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Fund") and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Fund"). (*Id.*) These Benefit Funds provided health and other non-pension benefits to covered miners who retired before January 1, 1976 (1950 Benefit Fund) or after January 1, 1976 (1974 Benefit Fund). The assets of the 1950 W & R Fund were transferred to the UMWA 1950 Pension Trust so that both Benefit Funds started with a zero funding base. (*Id.* at 83-84.) The funding for the two new Benefit Funds was to come from BCOA members and other signatories to the 1974 NBCWA. (*Id.* at 86-89.) However, perhaps the most revolutionary change brought by the 1974 NBCWA was the explicit promise that a covered retired miner would retain health benefits *for life*. (*Id.* at 99.) The class of beneficiaries entitled to benefits also was expanded to include all surviving spouses of UMWA retirees, rather than just widows of miners killed in mines as was previously the case. (*Id.* at 99, 103.) These changes greatly expanded the number of widows and disabled mine workers eligible for benefits. (Pls.' Ex. 38 (UMWA Health and Retirement Funds 1975 Annual Report) at CF 02762.)

The 1978 NBCWA brought about still more changes in UMWA retiree health benefits. As a result of the 1978 NBCWA, the source of benefits for UMWA miners

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[8] The 1974 NBCWA also created a third plan, namely, the UMWA 1974 Pension Trust. However, that trust has no bearing upon this suit.

who retired before January 1, 1976 continued to be the 1950 Benefit Fund. (Pls.' Ex. 42 (1978 NBCWA).) Miners who retired on or after January 1, 1976 would receive benefits from individual plans established and financed by the signatories to the 1978 NBCWA. (*Id.*) The 1974 Benefit Fund was relegated to providing benefits to miners who retired on or after January 1, 1976 and who were "orphaned."[4] (*Id.*) The 1978 NBCWA also contained what has become known as the "guarantee" clause, subsequently interpreted to obligate signatory mine operators, and signatories to all subsequent NBCWAs, to make sufficient contributions to ensure payment of the benefits that had been promised for life in the 1974 NBCWA. (*Id.* at 113-14.) The Plans for both the 1950 and 1974 Benefit Funds were also modified to add what has become known as the "evergreen" clause, requiring continuing contributions in connection with the 1978 NBCWA.[5]

The next NBCWA, in 1988, added withdrawal liability for signatories to that agreement. (Pls.' Ex. 43 (1988 NBCWA) at 142-45.) That liability provision required

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[4] For purposes of the Coal Act, an "orphaned" retiree (referred to in the Act as an "unassigned beneficiary") is a retired coal miner or his or her dependent whose previous employer is no longer in existence.

[5] The so-called "evergreen" clause amended into the 1950 Benefit Plan and Trust provides that:

> Any Employer who employed any Participant eligible for coverage under, or who received or receives benefits under, the 1950 Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Benefit Trust, as amended from time to time, including, but not limited to, making the contributions required . . . under the National Bituminous Coal Wage Agreement of 1988, as amended from time to time, and any successor agreements thereto.

(Pls.' Ex. 45 (1950 Benefit Plan and Trust) at 36.)

employers withdrawing from the Benefit Funds to pay an actuarially determined amount to cover the future costs of retirees "orphaned" by the withdrawal. (*Id.*)

During the late 1970s and 1980s, the adequacy of funding for the Benefit Funds came into question. A number of large coal operators who had signed the 1978 and subsequent NBCWAs began terminating their participation in the Benefit Funds. This put a great demand on the 1974 Benefit Fund as the retirees of these non-participating operators began to draw their benefits from the 1974 Benefit Fund in growing amounts. The remaining employers had to pay drastically increasing contributions to keep the Benefit Fund afloat. The financial burden to remaining NBCWA signatories became an ever-increasing incentive to withdraw from the Benefit Fund.

During this same era, a number of other factors also significantly impacted the UMWA health benefit funds. One, the cost of health care continued to rise. Two, there was a substantial decrease in the amount of coal being produced by NBCWA operations. Three, large numbers of miners reached retirement age while the number of mine operators dwindled. Furthermore, Plaintiffs submit that fraud and mismanagement also plagued the Benefit Fund. Regardless of the cause, a crisis was reached in the funding of coal industry retiree health benefits by the beginning of the 1990s. The controversy was most dramatically demonstrated in the protracted strike against the Pittston Coal Company and related entities. Following the settlement of that strike, the Secretary of Labor, Elizabeth Dole, formed the Coal Commission (formally known as the Advisory Commission on United Mine Workers of America Retiree Health Benefits) to examine and report on this problem. In the resulting written Coal Commission Report, as might be expected, the Commission was in substantial agreement in identifying the rising cost of paying for the "orphan" retirees as the principal cause of the mine workers health-care funding crisis. In

fact, it was projected that the 1950 and 1974 Benefit Funds would accumulate a combined deficit of $300 million by the end of 1993 if no action was taken. COAL COMMISSION REPORT: A REPORT TO THE SECRETARY OF LABOR AND THE AMERICAN PEOPLE 3 (Nov.1990) [hereinafter COAL COMMISSON REPORT]. However, there was a divergence of opinion concerning the obligation of mine operators regarding retiree health-care benefits and on how to finance those health benefits. The Report was made available to Congress to supplement other information gathered in connection with hearings held in the United States Senate on this problem. In substantial part, the 1992 Coal Act was designed to ameliorate the coal industry retiree health care funding predicament.

Only one of the three funding mechanisms created by the 1992 Coal Act is at issue in this case: specifically the UMWA Combined Benefit Fund ("Combined Fund"). 26 U.S.C. §§ 9702, 9711, 9712. The Combined Fund is a statutory merger of the 1950 Benefit Fund and the 1974 Benefit Fund. 26 U.S.C. § 9702(a)(2). On February 1, 1993, $70 million was transferred into the Combined Fund from the 1950 Pension Trust. 26 U.S.C. § 9705 (a)(1)(A). This amount was used to proportionately reduce the total premium of each assigned operator. 26 U.S.C. § 9705(a)(3)(A). Thereafter, the 1950 Pension Trust transferred an additional $70 million into the Combined Fund on October 1, 1993 and another $70 million on October 1, 1994. 26 U.S.C. § 9705(a)(1)(B)-(C). Additionally, beginning on October 1, 1995 and extending through the year 2003, the Abandoned Mine Reclamation Fund will transfer up to $70 million to the Combined Fund each year in which such funds are available. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). These transferred funds are to be used to proportionately reduce the unassigned ("orphan") benefit premium and the death benefit premium that contributing employers would otherwise be required to pay to the Combined Fund. 26 U.S.C. § 9705(a)(3)(B). The Combined Fund is also author-

ized to be subsidized by health insurance premiums and death benefit premiums paid by each "assigned operator." 26 U.S.C. § 9704.

An "assigned operator" under the 1992 Coal Act is a signatory to any NBCWA since 1950. 26 U.S.C. § 9701(c)(5). Liability is to be "assigned" by the Secretary according to the beneficiaries' degree of prior employment with a signatory to any NBCWA since 1950. 26 U.S.C. § 9706(a), (b)(1). The Secretary is also required to assess a proportionate premium to each assigned operator to pay for the costs of health benefits for "unassigned beneficiaries" (*e.g.*, "orphans"). 26 U.S.C. § 9704(d), (f). The signatories to the 1988 NBCWA were obligated to pay the "start-up" costs of the Combined Fund for the period February 1, 1993 to September 30, 1993; thereafter, each "assigned operator" will be charged a share of these costs and the signatories to the 1988 NBCWA will receive an offset for their start-up contributions against future funding obligations. 26 U.S.C. § 9704(g), (i)(3).

The purpose of the 1992 Coal Act is to provide funds for UMWA retiree health care benefits through the private sector. Plaintiffs emphasize that the Coal Act is premised on the specific legislative finding that:

> [T]o secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, at § 19142(a)(2). As a result of the Coal Act, every coal operator, present and former, that signed any NBCWA from 1950 through 1988 and which is still in existence in any form, is obligated to contribute to the new statutory benefit fund. 26 U.S.C. §§ 9701(c)(5), 9706.

Pursuant to the Secretary's assignment process, Plaintiffs have been notified that they are responsible for paying insurance premiums for a certain number of former employees, including surviving spouses and dependents ("assigned beneficiaries") and a number of "orphans" ("unassigned beneficiaries"). For the year beginning October 1, 1993, Templeton was assigned 39 beneficiaries, resulting in an assigned premium of $138,131.35; Princeton was assigned 117 beneficiaries, resulting in an assigned premium of $419,325.17; Sherwood was assigned 4 beneficiaries, resulting in an assigned premium of $15,147.22; and Berwind was assigned 914 beneficiaries, resulting in an assigned premium of $3,227,527.96. Obviously, these assignments and the resulting premiums will decrease over the years as beneficiaries die, but Plaintiffs argue that the liability for some beneficiaries could continue for up to thirty years.

It is this so-called "reachback" liability imposed by section 9704 of the Coal Act that is challenged in this suit. Plaintiffs contend that none of the NBCWAs they signed obligated them to make any payments toward retiree health insurance benefits after their participation in the coal mining business terminated. They build on this argument by pointing out that all of the provisions of post-1964 NBCWAs which Congress believed to be the basis for imposing "reachback liability" (*i.e.*, the lifetime duration, the "guarantee" clause, the "evergreen" provisions and withdrawal liability) were instituted in agreements entered into after Plaintiffs left the industry. Plaintiffs' position is simple—they didn't agree to this liability and Congress can't (constitutionally) make them responsible for it. However, even after Plaintiffs stopped contributing to the 1950 W & R Fund, their retired employees, and subsequently retiring persons who had worked for Plaintiffs at various times, continued to receive benefits from the Benefit Fund. In effect, this resulted in a shift of the responsibility for financing health benefits for Plaintiffs' former employees to the coal mine operators who con-

tinued to participate in the Benefit Fund. There is a strong indication that Congress assumed that all signatories to NBCWAs since 1950 had committed lifetime health benefits to UMWA retirees without qualification.[6]

Defendants do not dispute the financial impact of the Coal Act as asserted by Plaintiffs, except that Defendants point out that fund transfers pursuant to 26 U.S.C. § 9705(a)(1) & (b) will defer, if not eliminate, Plaintiffs' actual payment obligations as to the orphans." Nevertheless, no significant challenge is raised to the Plaintiffs' standing to bring this suit or the jurisdiction of this court to consider it.

The parties are also in general agreement with the historical background described by Judge Graham in *Barrick Gold Exploration v. Hudson*, 823 F.Supp. 1395, 1398-1401 (S.D.Ohio 1993), *aff'd*, 47 F.3d 832 (6th Cir. 1995). Although they may dispute whether the current state of under-funding of the miners' welfare benefits results from fraud and mismanagement or increasing costs combined with a diminution in the number of contributors to the Benefit Funds, the court finds these questions to be immaterial to resolution of the instant dispute.

Plaintiffs filed an amended complaint on December 16, 1993 seeking a judgment declaring the portion of the Coal Act that would require them to pay health insurance premiums for their former employees and a *pro rata* share of the "orphans" declared unconstitutional and enjoining the enforcement of said statute against them. They base their challenge on both the Due Process and Takings

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[6] Plaintiffs have pointed to multiple comments by Senators which suggest such an assumption. *See, e.g.*, 138 Cong.Rec. S10,784 (daily ed. July 29, 1992) (statement of Sen. Byrd) ("[t]his amendment . . . says that when promises are made, promises will be kept"); *id.* at S10,785 (statement of Sen. Byrd) (Act's goal is "to protect the retirees whose were promised lifetime benefits"); *id.* at S10,786 (statement of Sen. Wofford) ("retired miners are entitled to the health care benefits they were promised").

Clauses of the United States Constitution. U.S. CONST. amend. V. Their challenge is slightly different from the one raised in *Barrick Gold*, but is effectively identical to the challenge raised by the plaintiff in *Blue Diamond Coal Co. v. Shalala (In re Blue Diamond Coal Co.)*, 174 B.R. 722 (E.D.Tenn. 1994). The plaintiffs in *Barrick Gold* were also former coal mine operators who had terminated their coal mine operations *after* becoming signatories to the 1988 NBCWA. None of the Plaintiffs in this case, by contrast, have signed an NBCWA since 1964 at the latest; thus, they are situated similarly to the plaintiff in *Blue Diamond* whose last NBCWA expired in 1964. 174 B.R. at 724. A lot has happened, Plaintiffs argue, since that time to materially alter subsequent NBCWAs—specifically, the development of the 1974 Benefit Fund and the adoption of the "guarantee" and "evergreen" clauses and the contractual withdrawal-liability provision. Plaintiffs contend that their liability to former employees terminated when their employment of miners under the NBCWAs to which they were signatories ended. They argue that the Constitution precludes assessment of current liability against them because they did not agree to such exposure in the contracts they entered. Plaintiffs' constitutional challenge is clearly an attack on section 9704 only, and only to the extent "as applied" to them, rather than a facial challenge to the constitutionality of the entire statutory scheme.

II. Summary Judgment Standard

The Seventh Circuit stated the standard for summary judgment in *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

> Fed.R.Civ.P. 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

> and that the moving party is entitled to judgment as a matter of law." When the facts are disputed, the parties must produce proper documentary evidence to support their contentions, and may not rest on mere allegations in the pleadings, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960 [104 S.Ct. 392, 78 L.Ed.2d 336] (1983), or upon conclusory statements in affidavits. *First Commodity Traders v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir.1985). In reviewing a grant of summary judgment, all reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Matsushita Elecs. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 [106 S.Ct. 1348, 1356, 89 L.Ed.2d 538] (1986). . . . The mere existence of a factual dispute will not bar summary judgment unless "the disputed fact is outcome determinative under governing law." *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 [104 S.Ct. 284, 78 L.Ed.2d 262] (1983).

Id. at 642.

The Supreme Court further clarified the scope of Federal Rule of Civil Procedure 56 in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In *Celotex*, the Court held that the initial burden is on the moving party to demonstrate "with or without affidavits" the absence of genuine issues of material fact and that, absent such material facts, judgment should be granted as a matter of law in the moving party's favor. 477 U.S. at 323, 106 S.Ct. at 2553. Once the moving party has met its burden, the opposing party must "go beyond the pleadings" and designate specific facts to support or defend each element of the claim, demonstrating a genuine issue for trial. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-

53; *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir.1990). Not every factual dispute creates a barrier to summary judgment, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

III. Discussion

A. Due process Analysis

The Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. In considering due proces challenges to economic legislation such as the Coal Act, the Supreme Court has repeatedly held that such legislation must be sustained unless Congress has acted arbitrarily or irrationally. In the Court's words:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464-65, 99 L.Ed. 563, *reh'g denied*, 349 U.S. 925, 75 S.Ct. 657, 99 L.Ed. 1256 (1955)). *See also Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717-18, 81 L.Ed.2d 601 (1984).

Economic legislation comports with due process if it bears a rational relationship to a legitimate governmental

purpose. *Regan v. Taxation With Representation*, 461 U.S. 540, 547, 103 S.Ct. 1997, 2001-02, 76 L.Ed.2d 129 (1983); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84, 98 S.Ct. 2620, 2635-37, 57 L.Ed.2d 595 (1978); *LTV Steel Co., Inc. v. Shalala (In re Chateaugay Corp.)*, 163 B.R. 955, 962 (S.D.N.Y. 1993); *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 758 F.Supp. 6, 9 (D.D.C.1991), *aff'd*, 967 F.2d 648 (D.C.Cir.1992). The party "challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979). *See also Hodel v. Indiana*, 452 U.S. 314, 323, 101 S.Ct. 2376, 2382-83, 69 L.Ed.2d 40 (1981); *Association of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 866-67 (D.C.Cir.1992), *vacated in part sub nom. Delta Junior College, Inc. v. Riley*, 1 F.3d 45 (D.C.Cir. 1993) (finding that the provisions of the Student Loan Default Prevention Act do not violate the Due Process or Takings Clauses); *Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 725 F.2d 843, 853-54 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr v. Bakery, Confectionery & Tobacco Workers Int'l Union of Am.*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 856 (1984) (finding that the Multiemployer Pension Plan Amendment's Act ("MPPAA"), requiring employers to pay a proportionate share of a multiemployer pension plan's unfunded vested liabilities, does not violate the Due Process Clause); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C.Cir.1984) (finding that the MPPAA does not violate the Due Process Clause); *A-T-O, Inc. v. Pension Benefits Guar. Corp.*, 634 F.2d 1013 (6th Cir.1980) (upholding constitutionality of MPPAA); *Colorado Springs*, 758 F.Supp. at 9 (finding that the Agricultural Credit Act requirement that

Farm Credit Assistance Corporations must each make a one-time purchase of essentially worthless stock to shore up financially troubled Farm Credit System does not violate Due Process or Takings Clause).

A sufficient rational relationship exists so long as a "rationale Congress 'could' have had for enacting the statute can validate the legislation, regardless of whether Congress actually considered that rationale at the time the bill was passed." *United States v. Osburn*, 955 F.2d 1500, 1505 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 223, 121 L.Ed.2d 160 (1992). *See also United States v. Carolene Prods. Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938) (stating that the court's role "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for" the challenged legislation); *Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir.1990) (stating that a "governmental action passes the rational basis test if a sound reason may be hypothesized" for the legislation). In enacting such economic legislation, Congress has "absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477, 105 S.Ct. 1441, 1458, 84 L.Ed.2d 432 (1985). *See also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91, *reh'g denied sub nom. Shell Oil Co. v. Governor of Md.*, 439 U.S. 884, 99 S.Ct. 232, 58 L.Ed.2d 200 (1978) (noting that the "Due Process Clause does not empower the judiciary 'to sit' as a 'superlegislature to weigh the wisdom of legislation' "); *Carolene Prods. Co. v. United States*, 323 U.S. 18, 29, 65 S.Ct. 1, 7, 89 L.Ed. 15 (1944). The court "need not satisfy [itself] that the challenged rules will in fact further their articulated purposes; it is sufficient if 'the legislature could rationally have concluded that the purposes would be achieved.' " *Allright Colo., Inc. v.*

City & County of Denver, 937 F.2d 1502, 1512 (10th Cir.), *cert. denied*, 502 U.S. 983, 112 S.Ct. 587, 116 L.Ed.2d 612 (1991), *and reh'g denied*, 502 U.S. 1082, 112 S.Ct. 994, 117 L.Ed.2d 155 (1992) (citations omitted).

Additionally, "the law need not be in every respect logically consistent with its aims to be constitutional," *Williamson*, 348 U.S. at 487-88, 75 S.Ct. at 464, and legislative "line-drawing" does not violate substantive due process even if "some persons who have almost equally strong claims to particular treatment are placed on different sides of the line. . . ." *United States v. Lee*, 957 F.2d 778, 782 (10th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 475, 121 L.Ed.2d 381 (1992). Legislation "does not offend due process simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Das v. Sullivan*, 789 F.Supp. 324, 326 (N.D.Cal.1992), *aff'd*, 17 F.3d 1250 (9th Cir.1994) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)). *See also Colorado Springs*, 758 F. Supp. at 10 ("There is no requirement that the burden imposed by legislation be exactly proportionate to the benefits received."). Nor does the fact that the final version of an Act is the result of considerable legislative compromise suggest that it is irrational. *Lyng v. International Union*, 485 U.S. 360, 363, 108 S.Ct. 1184, 1188, 99 L.Ed.2d 380 (1988).

The burden is on Plaintiffs, in bringing their complaint alleging a due process violation, to establish that Congress acted in an arbitrary and irrational way in connection with economic legislation. *See, e.g., id.* at 15; *Ferguson*, 372 U.S. at 726, 83 S.Ct. at 1029; *Williamson*, 348 U.S. at 487-88, 75 S.Ct. at 464-65. Great deference is paid to the legislative decisions of Congress. Plaintiffs' due process challenge can prevail only if they show the questioned statute to be arbitrary, discriminatory or de-

monstrably irrelevant to the policy the legislature is free to adopt. *Nebbia v. New York*, 291 U.S. 502, 539, 54 S.Ct. 505, 517, 78 L.Ed. 940 (1934). The statute must stand if a rational relationship exists between it and a legitimate governmental objective. *Id.* at 537, 54 S.Ct. at 516.

Accordingly, the broad extent of congressional power is limited only by the constraints of a rational relationship between the enactment and an appropriate goal of government. Given the low level of scrutiny applied to federal legislation allocating the burdens and benefits of economic life, it is not surprising that virtually every substantive due process challenge to economic legislation has failed since *Railroad Retriement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 354, 55 S.Ct. 758, 764, 79 L.Ed. 1468 (1935), the continuing vitality of which has been severely questioned. *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir.1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984). The string of unsuccessful challenges to economic legislation seems endless. *See, e.g., Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *R.A. Gray*, 467 U.S. at 717, 104 S.Ct. at 2709; *Turner Elkhorn*, 428 U.S. at 1, 96 S.Ct. at 2882. Some even speculate that economic regulations can never be found to be irrational. *Central States Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1343 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992). Nevertheless, Plaintiffs seek to focus on several aspects of the Coal Act in order to distinguish this case from the hordes of other failed endeavors.

First, Plaintiffs frame their argument as though the Coal Act is retroactive legislation as applied to them. Simply put, they contend that their sole commitment to funding health benefits was a fixed per-ton contribution and the last ton giving rise to such an obligation was

mined decades ago. Analogizing to the subsequently created pensions in *Alton*, Plaintiffs contend that the retiree health benefits are the supplementation of an earlier wage already paid to the retirees. If the legislation is retroactive, a greater justification will be required in a due process test. *Turner Elkhorn*, 428 U.S. at 17, 96 S.Ct. at 2893. Nevertheless, in order to mount a successful due process challenge to the Coal Act's "reachback" provisions, Plaintiffs must demonstrate that there is no rational relationship between that part of the legislation and an appropriate governmental goal.

Plaintiffs are assessed liability for retiree health benefits because of their prior coal mining activity under NBCWAs. However, the use of previously existing facts to regulate subsequent action is not necessarily retroactive legislation. *Reynolds v. United States*, 292 U.S. 443, 449, 54 S.Ct. 800, 803, 78 L.Ed. 1353 (1934) ("A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends . . . are drawn from a time antecedent to the enactment."); *Cox v. Hart*, 260 U.S. 427, 435, 43 S.Ct. 154, 157, 67 L.Ed. 332 (1922) ("A statute is not made retroactive merely because it draws upon antecedent facts for its operation."). When a statute merely relates to current and future conditions and neither punishes past wrongdoing nor imposes liability for past acts, the statute simply is not retroactive. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984, 996 (D.S.C. 1984), *aff'd in part and vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir.1988), *and cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). In other words, liability imposed for present and future conditions arising out of past conduct is not *per se* retroactive. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

The Coal Act is simply not "retroactive" for purposes of due process analysis. *See, e.g., Metropolitan Property & Casualty Ins. Co. v. Rhode Island Insurer's Insolvency Fund,* 811 F.Supp. 54, 58 (D.R.I.1993) (finding a state insurance insolvency act not retroactive despite application of insurer assessments to claims traceable to pre-enactment insolvencies); *South Carolina Recycling,* 653 F.Supp. at 996 (finding remedial environmental legislation premised on present and future effects of landowners' past actions "not 'retroactive' in constitutional [due process] sense").

Plaintiffs further argue that passage of the Coal Act was not "foreseeable" when they last employed UMWA mineworkers in the 1950s and early 1960s and that it otherwise upset their "settled expectations" that the NBCWAs to which they were signatory in years past would forever delimit their health care obligations to their UMWA retirees. (Mem. in Supp. of Pls.' Mot. for Summ.J. at 13-16, 21-22.) The Supreme Court, however, has never embraced a foreseeability or expectation-based model for substantive due process analysis. Whether or to what extent a particular piece of legislation dashes a parties' economic "expectations" generally poses no constitutional impediment since *all* economic legislation—whether labelled prospective or retroactive—inherently disrupts *someone's* financial expectations. *See* LON L. FULLER, THE MORALITY OF THE LAW 60 (1964) (quoted with approval in *Landgraf v. USI Film Prods.*, —— U.S. ——, —— n. 24, 114 S.Ct. 1483, 1499 n. 24, 128 L.Ed.2d 229 (1994) ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.")).[7] In this respect, the

[7] As the Court observed in *Landgraf,* even uncontroversially prospective legislation may unsettle expectations and impose burdens on past conduct. "[A] new property tax or zoning regulation may upset the reasonable expectations that prompted those affected

Court's comments in *Concrete Pipe* affirming the MPPAA's imposition of statutory withdrawal liability on certain employers applies equally to Plaintiffs' complaints against the Coal Act:

> [I]t may be that the liability imposed by the Act . . . was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

—— U.S. at ——, 113 S.Ct. at 2287 (citations omitted).

Moreover, while Plaintiffs repeatedly cite the Supreme Court's recent decision in *Landgraf* as authority for a retroactivity test based upon whether an enactment attaches "new" legal duties or consequences to past transactions, (Mem. in Supp. of Pls.' Mot. for Summ.J. at 5-7), *Landgraf* represents no such change in substantive due process jurisprudence. At issue in *Landgraf* was whether or not Congress intended the retroactive application of the newly-available employment discrimination remedies (*i.e.*, compensatory and punitive damages) under the Civil Rights Act of 1991 to apply retroactively to cases pending at the time of its enactment. —— U.S. ——, 114 S.Ct. at 1492. Finding that the Act's legislative history lacked an unambiguous expression of congressional intent regarding the temporal scope of the Act, the Court declined to give retroactive effect to the statute's remedial provisions in light of the general presumption that statutes are not to be given retroactive effect absent a clear congressional command. *Id.* at ——, 114 S.Ct. at 1505.

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to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment. . . ." ***Landgraf,*** —— **U.S. at —— n. 24, 114 S.Ct. at 1499 n. 24.**

Given *Landgraf's* focus on statutory interpretation rather than substantive due process, it has little, if any, applicability to this action. *Landgraf* promulgated a rule of statutory construction, not constitutionality. Here, unlike the Civil Rights Act at issue in *Landgraf*, there can be no question as to Congress' intent. The Coal Act clearly and unambiguously provides that *any* operator signatory to any NBCWA may be subject to premium obligations for its UMWA retirees and dependents and a proportional share of any "orphan" employees and their dependents. 26 U.S.C. §§ 9701, 9706(a). Thus, whatever may be said for the role played by considerations of "settled expectations" and "reasonable reliance" in *Landgraf's* calculus for divination of congressional intent, such considerations play little, if any, part in the appropriate characterization of Coal Act premiums as "retroactive" or "prospective" in the constitutional sense. Indeed, while *Landgraf* does not cite to the seminal substantive due process trilogy of *Turner Elkhorn, R.A. Gray* and *Concrete Pipe*, the Court nevertheless invokes the spirit of those cases when noting that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." —— U.S. at ——, 114 S.Ct. at 1499. Plaintiffs' reliance on *Landgraf's* "new legal duty or consequence" discussion is thus misplaced.

In the end, Plaintiffs' characterization of the Coal Act as imposing "new" legal duties in the form of statutory premium obligations is nothing more than a conclusory label that fails to advance their position. In the broadest sense, all legislation, by its very nature, necessarily imposes some "new" legal duties and obligations. Thus, while true that the Coal Act imposes a *statutory* premium obligation that did not exist prior to its enactment, it is also equally true that signatory operators have been paying *contract-based* health care "premiums" for active and retired UMWA miners, in the form of royalties on ton-

nage mined or man hours worked, since the inception of the first UMWA health and retirement fund in 1946. The Coal Act therefore represents merely an "adjustment" to signatory operators' existing or pre-existing contractual obligations to fund health care benefits for UMWA miners and retirees. Because the Coal Act does not write on an historical blank slate, but merely provides for a prospective statutory continuation of collectively-bargained health care premium payments for UMWA miners dating back nearly half a century, the Act imposes neither "new" nor "retroactive" legal duties on Plaintiffs in the constitutional sense. Regardless, retroactivity alone would not doom the Coal Act under the Due Process Clause. *Turner Elkhorn,* 428 U.S. at 16, 96 S.Ct. at 2892-93. Even retroactive application of an economic burden may be based upon a rational legislative purpose. *R.A. Gray,* 467 U.S. at 717, 104 S.Ct. at 2709.

Plaintiffs also strenuously argue that the agreements they signed contained nothing more than defined contribution requirements, setting a per-ton amount to be paid into a welfare plan for a finite period of time, specifically, for the term of the agreements. Distribution of the benefit proceeds was left entirely to the trustees' discretion and Plaintiffs made no commitment that reasonably could be construed to have promised, suggested or implied that the welfare benefits, or the funding for those benefits, would continue for the lives of Plaintiffs' former employees or their dependents. They also point to the fact that the plan to which Plaintiffs contributed, the 1950 W & R Fund, was effectively dissolved and folded into the UMWA 1950 Pension Trust by the 1974 NBCWA. Plaintiffs further contend that all of the commitments made by coal mine operators that have given rise to claims of life-time welfare benefits by retirees—*i.e.*, the "guarantee" clause, the "evergreen" clause and withdrawal liability—were made by other operators in agreements signed ten years and more after any Plaintiff last signed an NBCWA. Plaintiffs further contend that

they never committed to funding welfare benefits for spouses or the "orphans" who were not directly employed by them. They argue that these substantial expansions of coverage occurred well after Plaintiffs had moved from mining UMWA mines on to other endeavors.

Plaintiffs' due process challenge gains nothing from their reliance on the language of the now-expired NBCWAs in the 1950s and 1960s limiting their UMWA health and pension contributions to the duration of those particular collective bargaining agreements. (*See, e.g.*, Mem. in Supp. of Pls.' Mot. for Summ.J. at 5, 12-15, 18.) Congress' legislative horizon cannot be eclipsed by private contractual terms or disclaimers. *Concrete Pipe*, —— U.S. at ——-——, 113 S.Ct. at 2288-89 (federal economic legislation reviewed for rationality only and not subject to Contract Clause constraints); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166 (1986) ("Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congential infirmity."); *R.A. Gray*, 467 U.S. at 733, 104 S.Ct. at 2719-20.

Plaintiffs' contract-based argument is no longer viable in light of *Concrete Pipe*. At issue in *Concrete Pipe* was the constitutionality of MPPAA provisions imposing statutory withdrawal liability on an employer who was otherwise protected from contribution obligations to a multiemployer pension trust by contractual disclaimer. —— U.S. at ——-——, 113 S.Ct. at 2286-89. Like Plaintiffs here, the withdrawing plaintiff-employer sought refuge in the language of the Trust Agreements expressly providing that pension benefits were not guaranteed, that benefits were payable only to the extent that sufficient assets existed, and that the employer's sole obligation was to make pension contributions specified in the collective bar-

gaining agreement. *Id.* at — & n. 24, at 2288 & n. 24. Soundly rejecting the notion that private contracts present a due process bar to congressional action, the Court in *Concrete Pipe* held that federal economic legislation is only subject to review for rationality irrespective of the terms of any private agreements.

Plaintiffs have simply failed to show that it was irrational for Congress to determine that operators under the NBCWAs of the 1950s and 1960s remain, at least in some part, responsible for retiree health benefit liabilities. The dispute about when lifetime health benefits were promised to retired mine workers, and by whom, is a multi-sided contest, pitting coal mine operators from different eras against one another, as well as involving present and former mineworkers and their families. A congressional decision to come down on the side of the retirees and their spouses and dependents is not totally void of reason. It may not be the best or fairest choice, but it is not irrational or arbitrary in the constitutional sense.

> The *Turner Elkhorn* case is highly instructive here. That case involved a Due Process challenge to the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972. In that legislation, Congress required coal operators to pay the medical costs of their former employees who were suffering from black lung disease, even though these employees had terminated their work in the industry before the Act was passed and even though the operators had never contracted to pay such compensation. The Supreme Court found that the Black Lung Benefits Act rationally spread the costs of the employees' disabilities to those who had profited from their labor. The same reasoning can be applied to the facts of this case. Congress has chosen to spread the costs of the Combined Fund's benefits to those employers who profited from the labor of UMWA miners and who, at some time in

their histories, had contributed to multi-employer welfare benefit funds.

Blue Diamond, 174 B.R. at 727.

Plaintiffs attempt to distinguish *Turner Elkhorn* by arguing that the Black Lung compensation scheme made each operator responsible only for the expenses related to its own workers, whereas the Coal Act imposes liability for the "orphans" with whom Plaintiffs had no direct employment connection. However, this argument ignores the fact that Plaintiffs benefitted from the pool of available UMWA workers, even if they only hired some of them. The availability of health-care benefits may have contributed to the existence of that workforce pool. Furthermore, Plaintiffs' narrow reading of *Turner Elkhorn* ignores subsequent recognition of pooled responsibilities. *See Concrete Pipe*, —— U.S. at ——, 113 S.Ct. at 2264.

The fact that Congress acted reasonably in imposing Coal Act premium obligations on all NBCWA signatories is confirmed by the findings of the Coal Commission and several district courts holding that early NBCWA signatories such as Plaintiffs, no less than NBCWA signatories in the 1970s and 1980s, helped foster retirees' legitimate expectations in lifetime health care benefits. *See, e.g., United Mine Workers of Am. v. Nobel*, 720 F.Supp. 1169, 1178 (W.D.Pa.1989), *aff'd without opinion*, 902 F.2d 1558 (3d. Cir. 1990), *and cert. denied*, 499 U.S. 904, 111 S.Ct. 1102, 113 L.Ed.2d 212 (1991) (finding promise of lifetime health benefits to UMWA retirees based, *inter alia*, on "25-year history of lifetime benefits prior to 1974"); *Grubbs v. United Mine Workers of Am.*, 723 F.Supp. 123, 125 (W.D.Ark.1989) ("Since the 1950's retired mine workers have been provided with health benefits as a *vested lifetime benefit* under the UMWA Welfare and Retirement plan.") (emphasis added). *See also LTV Steel*, 163 B.R. at 961; *Barrick Gold*, 823 F.Supp. at 1402, 1405; COAL COMMISSION REPORT at vii-viii, 1.

Plaintiffs' assertion that the Coal Act embodies an "indiscriminate" and "faulty" congressional assumption that early signatories "promised" lifetime health benefits to UMWA retirees thus falls short of the mark. The relevant constitutional question is not whether Plaintiffs in fact made an express contractual "promise" of lifetime health benefits, but, rather, whether Congress had plausible grounds upon which to include signatory operators such as Plaintiffs within the Coal Act's financing scheme. It could be that "[t]he assumptions underlying these rationales [are] erroneous, but the very fact that they are 'arguable' is sufficient on rational-basis review, to 'immunize' the congressional choice from constitutional challenge." *Federal Communications Comm'n v. Beach Communications, Inc.*, —— U.S. ——, ——, 113 S.Ct. 2096, 2104, 124 L.Ed.2d 211 (1993) (citation omitted). *See also Heller v. Doe*, —— U.S. ——, ——-——, 113 S.Ct. 2637, 2649-50, 125 L.Ed.2d 257 (1993).

Plaintiffs' attack on the rationality of the Coal Act's "reachback" to early NBCWA signatories, moreover, fails to take into account the nature of multiemployer plans such as the UMWA Benefit Trusts. All NBCWA signatories, whether last signatory to an NBCWA in 1950 or 1988, once employed UMWA retirees and provided them with portable service credits toward vested health and pension benefits.[8] As a consequence, any participating employer's withdrawal eroded the Trusts' contribution base without a concomitant decrease in the beneficiary population. Plaintiffs' claim that neither their retirees

[8] As the Supreme Court noted in *Concrete Pipe*, the nature of multiemployer plans dictates that it is the provision of portable service credits by participating employers, rather than the actual vesting of benefits, which provides the relevant due process inquiry. —— U.S. at ——, 113 S.Ct. at 2287. ("In determining whether the imposition of [MPPAA] withdrawal liability is rational, then, the relevant question is not whether a withdrawing employer's employees have vested benefits, but whether an employer has contributed to the plan's probable liability by providing employees with service credits.").

nor the UMWA Benefit Trusts suffered any "detriment" from their withdrawal from the multiemployer plan.[9] (Mem. in Supp. of Pls.' Mot. for Summ.J. at 13-14, 19-20.) This ignores the fact that other NBCWA signatories were then forced to shoulder the lifetime health care costs of *Plaintiffs'* retirees and dependents. This same scenario was replayed dozens of times over the years as increasing numbers of coal operators dumped their UMWA retirees on the UMWA Benefit Trusts' eroding contribution base. *See generally Concrete Pipe*, —— U.S. at ——, —— ——, 113 S.Ct. at 2271, 2287-88 (noting cost and risk-sharing features of multiemployer plans); *R.A. Gray*, 467 U.S. at 721 & nn. 2-3, 104 S.Ct. at 2713 & nn. 2-3 (discussing problem of so-called "inherited liabilities" in ongoing multiemployer plans with declining contribution bases).

Plaintiffs' withdrawal from the UMWA multiemployer plan, no less than the withdrawal of other employers occurring in later years, therefore contributed in some measure to the financial demise of the UMWA Benefit Trusts. Faced with the task of stabilizing the funding of UMWA retirees health benefits, Congress thus reasonably looked to all NBCWA signatory operators for premium contributions. As the Supreme Court recently noted in rejecting a due process challenge to retroactive economic legislation: "It is surely proper for Congress to legislate retrospectively to ensure that cost of a program are borne by the entire class of persons that Congress rationally

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[9] Plaintiffs' "detriment" argument is derived from Justice O'Connor's concurring opinions in *Concrete Pipe*, —— U.S. at ——, 113 S.Ct. at 2292, and *Connolly*, 475 U.S. at 229, 106 S.Ct. at 1028, wherein she expressed her view that imposition of MPPAA-based employer withdrawal liability would be unconstitutional "in the absence of any connection between the employer's conduct and some detriment to the employee." *Connolly*, 475 U.S. at 229, 106 S.Ct. at 1028 (O'Connor, J., concurring). *Accord Concrete Pipe*, ——U.S. at ——, 113 S.Ct. at 2292 (O'Connor, J., concurring). The court notes that this position has yet to command the support of a majority of the Court.

believes should bear them." *United States v. Sperry Corp.*, 493 U.S. 52, 65, 110 S.Ct. 387, 396, 107 L.Ed.2d 290 (1989). *See also R.A. Gray*, 467 U.S. at 730, 104 S.Ct. at 2718 (finding it rational for Congress to retroactively apply MPPAA withdrawal liability provisions to prevent premature employer exodus); *Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. at 2893 (rejecting substantive due process challenge to retroactive provisions of Black Lung Benefits Act based on a finding that the "imposition of liability for effect of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor"); *Monsanto*, 858 F.2d at 173-74 (rejecting constitutional challenge to environmental statute imposing remedial cleanup costs on pre-enactment disposal activities irrespective of timeframe in which such disposals occurred).

To the extent that Congress could have found that mine operators who terminated welfare contributions in the 1950s and 1960s "dumped" their future retirees on the operators who continued to make contributions, a legislative decision to recognize responsibility for that "dumping" cannot be said to be totally irrational. There may be many parties responsible for the under-funded condition Congress found the mine worker retiree health plans to be in as it addressed the problem in 1992. It is not an appropriate function of the courts to evaluate whether Congress most correctly and fairly assessed the blame for that crisis when it enacted the Coal Act. Plaintiffs' due process challenge must fail because they have failed to demonstrate that responsibility was placed on them in a completely irrational manner.

Plaintiffs further attack the Coal Act as imposing premium obligations that are substantially out of proportion to their experiences with the UMWA Benefit Trusts in the 1950s and 1960s. Specifically, Plaintiffs contend that the Coal Act impermissibly requires them to "under-

write benefits that were never available in the 1950s and 1960s when Plaintiffs mined coal, to persons who were never beneficiaries under the 1950 W & R Fund, and to miners (and their spouses and dependents) who never worked for Plaintiffs. (Mem. in Supp. of Pls.' Mot. for Summ.J. at 20.) The court finds this argument to be without merit.[10]

Plaintiffs' blanket assertion that the Coal Act requires them to underwrite health care benefits beyond those available under the UMWA Benefit Trusts in the 1950s and 1960s is simply mistaken. The 1950 UMWA Welfare and Retirement Fund to which Plaintiffs contributed during their signatory years provided a comprehensive health benefits package covering unlimited hospitalization, out-patient treatment and rehabilitation expenses. (Defs.' Supp. Ex. 15 (1953 UMWA Welfare and Retirement Fund Operating Manual) at VI-2000 to VI-5000); (Defs.' Supp. Ex. 16 (1958 UMWA Welfare and Retirement Fund Operating Manual) at VI-2000 to VI-5000); (Defs.' Supp. Ex. 17 (1961 UMWA Welfare and Retirement Fund Operating Manual) at IV-2000 to IV-5000.) Persons eligible for a UMWA "health card" included pensioned UMWA retirees and their wives, widows and dependents under eighteen years of age of deceased miners, and relatives of deceased miners caring for miners' orphaned children. (Defs.' Supp. Ex. 15 (1953 UMWA Welfare and Retirement Fund Operating Manual) at VI-1000 to VI-1001); (Defs.' Supp.Ex. 16 (1958 UMWA Welfare and Retirement Fund Operating Manual) at VI-1000 to VI-1107); (Defs.' Supp.Ex. 17 (1961 UMWA Welfare and Retirement Fund Operating

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[10] The court notes that Plaintiffs have yet to be assessed any Combined Fund premiums for UMWA retirees with whom they never shared an employment relationship. No signatory operators—including Plaintiffs—have been assessed any unassigned beneficiary premiums for either the first or second plan years as the transfers from the UMWA 1950 Pension Plan have proven sufficient to cover the health care costs of these orphaned retirees.

Manual) at IV-1000 to IV-1208.) Such coverage provisions do not differ markedly from the benefits currently provided to Combined Fund beneficiaries. *See* 26 U.S.C. § 9703(b); (Pls.' Ex. 43 (1988 NBCWA) at 145-64.)

Plaintiffs further claim that their Coal Act obligations are not reflective of their NBCWA experiences since they were "strangers" to the 1950 and 1974 UMWA Benefit Trusts from which the Combined Fund was formed. (Mem. in Supp. of Pls.' Mot. for Summ.J. at 7, 11-12. 14, 20.) While it is true that Plaintiffs never contributed to the immediate predecessor trusts to the Combined Fund, they fail to establish why such a fact presents an issue of constitutional significance. Plaintiffs bear no responsibility for eliminating pre-Act deficits in the 1950 and 1974 UMWA Benefit Trusts; only 1988 NBCWA signatories are statutorily tasked with making deficit reduction contributions. 26 U.S.C. § 9704(i)(1)(B).

Plaintiffs, moreover, are hardly strangers to UMWA multiemployer plans, having collectively contributed to the 1950 W & R Fund for over twenty years. Indeed, aside from the formalistic reconfiguration of the trust structure in 1974, the benefit program administered by the 1950 and 1974 UMWA Benefit Trusts (as established by the 1974 NBCWA) largely mirrored that of the 1950 W & R Fund. Plaintiffs' claim of being "strangers" to the 1950 and 1974 UMWA Benefit Trusts is nothing more than an exercise in form over substance.

Plaintiffs appear to be laboring under the assumption that due process demands precise conformity between their Coal Act obligations and their collective-bargaining experiences under the UMWA Benefit Trusts. Congress, however, need not legislate with mathematical precision in the economic arena so long as there is a rational fit between justification and means. *Concrete Pipe*, —— U.S. at ——, 113 S.Ct. at 2288. *See also Turner Elkhorn*, 428 U.S. at 19, 96 S.Ct. at 2894; *Washington Star*, 729 F.2d at 1510-11. Due process affords Con-

gress considerable flexibility in determining how to spread the costs of ensuring UMWA retiree health benefits among participants (and former participants) in various UMWA multiemployer benefit trusts.

Finally, Plaintiffs contend that the Coal Act amounts to an improper and unnecessary congressional "bailout" of 1988 signatory operators who made express contractual promises (through the so-called "guarantee" and "evergreen" clauses) to fund lifetime health benefits for UMWA retirees and dependents.[11] (Mem. in Supp. of Pls.' Mot. for Summ.J. at 9, 12-13, 18.) The Coal Act, however, presents a rational approach to the problem of securing UMWA retiree health benefits that does not impermissibly favor 1988 signatory operators at the expense of earlier NBCWA signatories.

The essential premise of the Coal Act's financing scheme is one of proportionality. Signatory operators

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[11] Plaintiffs' post-hoc allegation that the imposition of Coal Act premium obligations upon early NBCWA signatories was "unnecessary" to the financial stabilization of the UMWA Benefit Trusts, (Mem. in Supp. of Pls.' Mot. for Summ.J. at 20-21), fundamentally misapprehends the wide latitude afforded Congress when crafting economic legislation. Congress could well have concluded during the legislative process that a more narrowly defined class of signatory operators would have proven insufficient to rescue the UMWA Benefit Trusts from financial insolvency. *See* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1ST SESS., FINANCING UMWA COAL MINER "ORPHAN RETIREE" HEALTH BENEFITS 24-27 (Comm. Print 1993) [hereinafter FUNDING "ORPHAN RETIREES"]. Such a legislative conclusion is not subject to post-enactment empirical verification. *Beach Communications*, —— U.S. at ——, 113 S.Ct. at 2098 (stating that legislative choices are "not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"). In any case, financial and actuarial data presented at the Senate Coal Act hearings in September 1991 suggested that limiting the "reachback" provision to 1978 and later NBCWA signatories would still leave a significant number of beneficiaries—those whose last employer last signed and NBCWA prior to 1978—remaining in the 1950 Benefit Trust as "orphans." *See, e.g.*, FUNDING "ORPHAN RETIREES" at 24-27.

bear the financial responsibility for the health care costs of assigned Combined Fund beneficiaries and their *pro rata* share of any "orphaned" beneficiaries. Statutory transfers from the 1950 Pension Fund and the Abandoned Mine Reclamation Fund are also applied on a *pro rata* basis to reduce (or, as has occurred in the first and second plan years, effectively eliminate) a signatory's unassigned beneficiary premium. 26 U.S.C. § 9705(a)(3)(B), (b)(2). Such a proportional financing scheme may hardly be said to unfairly discriminate among classes of NBCWA signatories.

Several Coal Act provisions, moreover, serve to moderate the premium obligations of pre-1978 NBCWA signatories such as Plaintiffs. First, the Act's assignment hierarchy reflects a statutory preference for assigning beneficiaries to signatories of the 1978 NBCWA or subsequent coal wage agreements. 26 U.S.C. § 9706(a)(1)-(3). Assignments are made to pre-1978 signatories only as a default condition when no later signatory employed a particular UMWA retiree. *Id.* Second, 1988 signatories alone bear the responsibility for retiring the pre-Act deficits of the UMWA multiemployer plan. That the Coal Act contains such moderating provisions only serves to underscore the rationality of Congress' approach for financing UMWA retiree health benefits. *See Connolly*, 475 U.S. at 225 & n. 8, 106 S.Ct. at 1026 & n. 8 (noting MPPAA provisions mitigating economic impact on individual employers); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 367 n. 12, 100 S.Ct. 1723, 1729 n. 12, 64 L.Ed.2d 354, *reh'g denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1137 (1980) (noting congressional attempt to moderate impact of ERISA liability).

Yet even taking Plaintiffs' congressional "bailout" argument at face value, it nonetheless fails to undermine the constitutionality of the Coal Act. This court is not permitted to second-guess the wisdom of Congress' chosen

funding scheme by suggesting other scenarios (such as limiting "reachback" liability to post-1978 NBCWA signatories) which might have been potentially wiser or fairer under the circumstances. As the Supreme Court noted in *Turner Elkhorn*, due process demands only that federal economic legislation "approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." 428 U.S. at 19, 96 S.Ct. at 2894. *See also Ferguson*, 372 U.S. at 730-32, 83 S.Ct. at 1031-32; *Williamson*, 348 U.S. at 488, 75 S.Ct. at 464-65; *Long Island Oil Prods. Co., Inc. v. Local 553 Pension Fund*, 775 F.2d 24, 27 (2d Cir.1985) ("It is not the judiciary's task to balance the economic costs and benefits of a challenged Act, or to measure it against a particular social or economic philosophy.").

Plaintiffs' challenge to the Coal Act is effectively an attempt to recast a political battle into a constitutional mold. Stabilization of the funding base for UMWA retirees presented a multi-sided contest pitting coal operators of different eras against one another. All members of the coal industry, past and present, were afforded an ample opportunity to participate in the legislative process culminating in passage of the Coal Act. Not only did both the Coal Commission and the Senate Subcommittee on Medicare and Long-Term Care conduct public hearings, but no less than seven legislative measures proposing various means of funding UMWA retiree health benefits were introduced in the 102d Congress prior to passage of the Coal Act. *See* FUNDING "ORPHAN RETIREES" at 52-56 (summarizing the legislative history of the Coal Act). That Plaintiffs in their opinion "lost" this policy battle provides no solid ground for a constitutional challenge:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will

> eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Vance, 440 U.S. at 97, 99 S.Ct. at 942-43 (footnote omitted). *Accord Beach Communications*, —— U.S. at ——, 113 S.Ct. at 2101.

In reviewing the Coal Act, this court is not limited to measuring the law against the stated purpose. Instead, the court may appropriately question whether the legislation serves any *hypothetical* legitimate purpose. *Northside Sanitary Landfill*, 902 F.2d at 522. Here, the legislation stands up to Plaintiffs' due process challenge measured by either the stated purpose or a hypothesized reason. It holds those responsible, if only in part, liable. Congress is well within its authority in viewing the history of collective bargaining in the mining industry to determine that operators like Plaintiffs here created an atmosphere that promised lifetime health benefits to those who would retire from the industry. In return, such operators benefitted from the existence of a qualified work force. While Plaintiffs have presented many good arguments demonstrating that Congress may not have made the best choice available in imposing a portion of the financial burden for the Combined Fund upon pre-1978 NBCWA signatories, they have failed to show that Congress' choice was either arbitrary or irrational. The burden placed on Plaintiffs by the Coal Act is certainly more rational than selecting cattle ranchers or used car dealers to pay for UMWA retiree health benefits. Plaintiffs did work in the industry at one time. This fact, even in the absence of all the other reasons discussed *supra*, would be enough to keep Plaintiffs' connection to the current financial obligation from being considered either arbitrary or void of reason.

B. Takings Clause Analysis

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without paying the former owner just compensation. *Nixon v. United States*, 978 F.2d 1269, 1275 (D.C.Cir. 1992). The Supreme Court has consistently said that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, *reh'g denied*, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). *See also Dolan v. City of Tigard*, —— U.S. ——, ——, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994); *Colorado Springs*, 967 F.2d at 654 (citing cases).

Nevertheless, the Supreme Court has also made clear that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). The Court has "recognized, in a wide variety of contexts[ ] that government may execute laws or programs that adversely affect recognized economic values." *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. at 2659. Indeed, as the Court stated in *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985):

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legis-

> lative objectives, the legislature acts within its powers in imposing such new constraints or duties. . . .

Id. at 104, 105 S.Ct. at 1797. Thus, for purposes of constitutional review under the Taking Clause:

> [V]ested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life.

Id. at 105, 105 S.Ct. at 1798.

In discussing the appropriate standard to determine whether economic legislation violates the Takings Clause, the Court has stated that there is no set formula, and that it relies upon "*ad hoc*, factual inquiries into the circumstances of each particular case." *Connolly*, 475 U.S. at 224, 106 S.Ct. at 1025 (1986). Nevertheless, the Court has identified three factors as having particular significance:

> (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

Id. at 225, 106 S.Ct. at 1025 (citations omitted). When confronted with challenges to statutes involving economic regulatory legislation, the Court has consistently applied these factors and concluded that the statutory scheme passes constitutional muster. *See Penn Cent.*, 438 U.S. at 125, 98 S.Ct. at 2659-60; *Sperry Corp.*, 493 U.S. at 52, 110 S.Ct. at 389.

The Supreme Court's decisions in *Connolly* and *Concrete Pipe* directly control this case. When *Connolly* came to the Court in 1985, the Court has already rejected a Due Process Clause challenge to the MPPAA

in *R.A. Gray. Connolly* presented a Takings Clause challenge to the same statute. An employer, together with the trustees of an affected multiemployer pension plan, argued that the MPPAA violated the Takings Clause "by requiring employers to transfer their assets for the private use of pension trusts and, in any event, by requiring an uncompensated transfer." 475 U.S. at 221, 106 S.Ct. at 1024. In a unanimous decision, the Court rejected this argument stating that:

> [A]ppellants' submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment—if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefits others. . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

Id. at 222-23, 106 S.Ct. at 1025.

The Court likewise rejected the employer's argument that the MPAA deprived it of the benefits of contractual protection from any liability beyond the specified contributions to which the employer had agreed, holding that:

> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. . . . [H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose.

Connolly, 475 U.S. at 224, 106 S.Ct. at 1025 (citations omitted).

After applying the regulatory takings factors, the Court determined that the MPPAA did not constitute a taking in violation of the Fifth Amendment, even though the employees who benefited from the Act's requirements might have no employment relationship whatsoever with an employer affected by the law. In discussing the nature of the government action, the Court reasoned that, under the MPPAA, the government does not physically invade or permanently appropriate any of the employers' assets for its own use. 475 U.S. at 225, 106 S.Ct. at 1026. Instead, the Court concluded that the MPPAA merely protects pension plan participants by requiring withdrawing employers to pay their share of a multiemployer pension plan's unfunded vested obligations incurred during that employer's participation in the plan. *Id.* The Court found:

> This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.

Id. (citations omitted).

In considering the severity of the MPPAA's economic impact, the Court recognized that there was "no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability." *Connolly*, 475 U.S. at 225, 106 S.Ct. at 1026. The Court stressed, however, that "[t]he assessment of withdrawal liabiilty is not made in a vacuum . . . but directly depends on the relationship between the employer and the plan to which it had made contributions." *Id.* The Court also found it significant that the MPPAA contains several provisions that moderate and

mitigate the economic impact of an individual employer's liability, *id.* at 225-26, 106 S.Ct. at 1026-27, much like the mitigating provisions the court has already noted within the Coal Act. *See supra* pp. 819-820.

Finally, the Court considered whether the MPPAA interefered with employers' reasonable investment-backed expectations. In concluding that the statute did not, the Court reasoned that the employers had voluntarily elected to participate in a multiemployer pension plan when they knew or should have known not only that the multiemployer pension plan arena was subject to extensive federal regulation, but also that their withdrawal might trigger additional financial obligations. *Connolly*, 475 U.S. at 227, 106 S.Ct. at 1027. Thus, the court explained:

> "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." . . .
>
> We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. . . . We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal.

Id. at 227-28, 106 S.Ct. at 1027 (citations omitted).

A unanimous Supreme Court rejected a further Takings Clause challenge to the MPPAA in *Concrete Pipe*. —— U.S. at ——-——, 113 S.Ct. at 2289-92. The Court began with the proposition, previously stated in *Connolly*, that, in light of the deficiencies in the employer's due process arguments, " 'it would be surprising indeed to discover' the challenged statute nonetheless violat[ed] the Takings Clause." *Id.* at ——, 113 S.Ct. at 2289 (quoting *Connolly*, 475 U.S. at 223, 106 S.Ct. at 1025). After

again reviewing the three factors in *Connolly*, *Penn Central*, and other Takings Clause decisions, the Court found no taking and no constitutional violation. Emphasizing that the employer had voluntarily chosen to participate in the multiemployer plan, the Court held that, "[i]n light of the relationship between Concrete Pipe and the Plan, we find no basis to conclude that Concrete Pipe is being forced to bear a burden 'which, in all fairness and justice, should be borne by the public as a whole.' " —— U.S. at ——, 113 S.Ct. at 2292 (quoting *Armstrong*, 364 U.S. at 49, 80 S.Ct. at 1569).

Application of the principles set forth in *Connolly* and *Concrete Pipe* to the facts of this case leads to the inescapable conclusion that the Coal Act does not effect a "taking" and does not violate the Takings Clause. First, with respect to the nature of the governmental action involved—*i.e.*, requiring assigned operators to pay a share of the costs of providing health care benefits to UMWA retirees—Congress has not physically invaded nor permanently appropriated any of the affected operators' assets for the government's own use. *See LTV Steel*, 163 B.R. at 962. Instead, by requiring assigned operators to finance health benefits for the Coal Act's beneficiaries, Congress has merely enacted legislation designed to ensure the continuation of a health benefits program from which many assigned operators had attempted to walk away. This requirement does not give rise to any claim for just compensation under the Takings Clause. *See Sperry*, 493 U.S. at 62 n. 9, 110 S.Ct. at 394-95 n. 9 (finding that the state's deduction of judicial user fees from settlement awards was not a physical occupation requiring just compensation); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990) ("Requiring money to be spent is not a taking of property.").

Second, with respect to the severity of the Coal Act's impact, although it unquestionably "deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability," *Connolly*, 475 U.S. at 225,

106 S.Ct. at 1026, the Coal Act imposes liability that is directly related to the employment relationship between each NBCWA signatory and their previous employees and a proportionate share of the health benefits of orphan retirees.[12] This aspect of the statute is very similar to the previously upheld provisions of the MPPAA which require employers withdrawing from a multiemployer pension plan to pay a proportionate share of the plan's unfunded vested liabilities, including liabilities owed to employees whom the withdrawing employers never employed. As noted, Congress carefully weighed the alternatives and expressly determined that the costs of providing health care for orphan retirees are most fairly borne by all NBCWA signatories that remain in existence.

The Supreme Court in *Connolly* acknowledged that the economic impact of the MPPAA withdrawal liability provision could be harsh. The Court noted, however, that various provisions of the MPPAA moderated the impact on individual employers, and it found that "[t]here is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan. . . ." *Connolly*, 475 U.S. at 226, 106 S.Ct. at 1026-27. This language indicates that the vagaries of individual cases do not necessarily weigh significantly in a court's Takings Clause analysis.[13]

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[12] To the extent that *Dolan v. City of Tigard* is applicable to the case at bar, the employment relationship between each NBCWA signatory and its previous employees is sufficient to constitute the required "essential nexus" for Takings Clause purposes. —— U.S. at ——, 114 S.Ct. at 2317.

[13] Even if the relatively harsh impact of a statute on an individual company is deemed critical to a Takings Clause analysis, a comparison between the Coal Act and the provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, is instructive. Under CERCLA, any release of materials defined as hazardous waste under the statute, no matter how small the release and no matter when it occurred, can result in joint and several liability for the entire cost of cleaning up the site where the release occurred. In

See Spring Branch Mining Co., Inc. v. UMWA 1950 Pension Trust & 1950 Pension Plan, 691 F.Supp. 973, 979-80 (D.W.Va. 1987), *aff'd*, 854 F.2d 37 (4th Cir.1988), *and cert. denied*, 488 U.S. 1019, 109 S.Ct. 817, 102 L.Ed.2d 806 (1989) (withdrawal liability of $1.2 million not a taking).

Furthermore, just as the employers in *Connolly* and *Concrete Pipe* voluntarily elected to participate in multiemployer pension plans to reap the economic benefits of providing promised benefits through the use of pooled assets, all NBCWA signatories, at one time or another, assumed responsibility for providing health benefits to UMWA retirees, and voluntarily chose to finance that obligation by pooling their assets in multiemployer benefit plans. The Coal Act simply obligates those signatories to pay their fair share of the benefits for the retirees through a new, statutorily-imposed, multiemployer arrangement. The character of the congressional decision to allocate responsibility for this economic burden to former participants in the industry is no different in character from the liability constitutionally imposed for Black Lung disease benefits, pension funding, and environmental contamination. *See Barrick Gold*, 823 F.Supp. at 1405. As previously noted, while Plaintiffs were engaged in the business of mining coal, they benefitted from the pool

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other words, even the release of a *de minimis* amount of hazardous waste, done years before, can result in a party's liability under CERCLA for millions of dollars in cleanup costs. *See United States v. Kramer*, 757 F.Supp. 397, 423 (D.N.J.1991) ("CERCLA does not permit a *de minimis* defense to liability"). Nevertheless, Due Process and Takings Clause challenges to CERCLA, similar to those now made against the Coal Act, have been similarly rejected by the courts. *See United States v. Northeastern Pharmaceutical and Chem. Co.*, 810 F.2d 726, 734 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987) (rejecting both due process and takings challenges, holding that Congress acted rationally in "imposing liability for the cost of cleaning up such site upon those parties who created and profited from the sites and upon the chemical industry as a whole.").

of available UMWA workers, even if [they] only hired some of them. Accordingly, Congress is well within its authority, viewing the history of collective bargaining in the mining industry, to determine that operators like these Plaintiffs created an atmosphere that promised lifetime health benefits to those who would retire from the industry. Thus, as with the imposition of withdrawal liability in *Connolly*, any assessment against Plaintiffs "is not made in a vacuum," 475 U.S. at 225, 106 S.Ct. at 1026, but depends upon the earlier relationship between Plaintiffs, the UMWA Funds and the UMWA retirees. While Plaintiffs may take issue with Congress' scheme in apportioning responsibility for providing benefits to the retirees, the court cannot find that the scheme has no rational connection to Plaintiffs' earlier participation in the UMWA Funds and the concomitant obligations they undertook to the UMWA Funds' beneficiaries. *See LTV Steel*, 163 B.R. at 960 ("[T]he amount of the payments required of plaintiffs are directly related to the number of beneficiaries of the Combined Fund that were, in fact, employed at one time by plaintiffs, and are proportionate to plainitffs' activities under the NBCWAs.").

Finally, the Coal Act cannot be said to so interfere with the reasonable investment-backed expectations of former NBCWA signatories to the extent required to constitute a violation of the Takings Clause. Although Congress' power to address the retiree health care crisis in the coal industry does not depend upon the existence of a promise of lifetime benefits, the Coal Commission, several federal courts and even coal industry representatives have recognized that such an implied promise did, in fact, exist.

For example, Charles A. Owen, a trustee of the 1950 W & R Fund representing the coal mine owners, in a release issued to all 1950 NBCWA signatories on November 5, 1951, noted that the W & R Fund provided for the payment of "Hospitalization, Surgical and Medical Care for mine workers, including pensioners, and de-

pendents *during his life, without limit as to duration. . . .*" (Defs.' Ex. Y at 2 (emphasis added).)

Similarly, federal courts consistently have held that the UMWA retirees are entitled to lifetime health benefits. For example, in *Nobel,* 720 F.Supp. at 1169 the court held that:

> The language of the plan benefits contained in the past five collective bargaining agreements between the UMWA and the BCOA, providing that a pensioner 'will be entitled to retain a health services card for life,' *together with the 25-year history of lifetime benefits prior to 1974,* and the testimony of the parties of record establish that the parties intended to provide health benefits to the individual plaintiffs for life. We find that the language confers a right to benefits for the lifetime of the pensioner.

720 F.Supp. at 1178 (emphasis added). The Court in *Nobel* also found:

> Pension benefits for retired miners were provided beginning in 1947, under the previous trust, and health benefits were provided to retired miners beginning no later than 1950. *The pension and health benefits for retired miners were provided throughout the life of the miner. The eligibility of the retired miner to receive pension and health benefits from the 1950 Fund was not affected by whether the last employer ceased operations, went out of business, or failed to become signatory to successor agreements.*

Id., 720 F.Supp. at 1173 (emphasis added). *See also District 29, United Mine Workers of Am. v. United Mine Workers of Am. 1974 Benefit Plan & Trust,* 826 F.2d 280, 282 (4th Cir.1987), *cert. denied,* 485 U.S. 935, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988) ("[W]e agree with the district court's conclusion that the intentions of the parties in providing for retirement health benefits was to guarantee their provision for life."); *In Re Chateaugay*

Corp., 945 F.2d 1205, 1210 (2d Cir.1991), *cert. denied*, 502 U.S. 1093, 112 S.Ct. 1167, 117 L.Ed.2d 413 (1992) ("[R]etired employees are guaranteed the provision of health benefits for life under the collective bargaining agreement."); *Barrick Gold*, 823 F.Supp. at 1402; *LTV Steel*, 163 B.R. at 960.

Additionally, Plaintiffs cannot argue that government regulation of the type created by the Coal Act was totally unexpected. In a 1953 speech, Joseph E. Moody, the president of the Southern Coal Producers' Association, envisioned that the federal government could assume responsibility for continuing the UMWA multiemployer benefit arrangement in the event that the private fund became insolvent. Moody stated that:

> I hesitate to speculate on what might happen if the Coal Welfare Fund again goes broke. It is certain that the mine operators, already operating at a loss, cannot increase the royalty payment. Instead, it should be lowered.
>
> But depriving some 400,000 persons of benefits they have been promised and grown accustomed to, could be political as well as social dynamite. It is entirely conceivable that Congress, with an eye to the danger of complete disruption of the domestic coal industry —and to the votes involved—might decide it was necessary to step in and take over the mines, assuming responsibility for the welfare coliections and payment. After all, the government has seized the coal mines four times in recent years—just as it has seized the railroads and steel mills in times it considered that national emergencies existed, because of major labor troubles.
>
> Even under government seizure, of course, the welfare fund as it stands today could only be reactivated under government subsidy—and this of course, would only be the first step toward nationalization

> of coal, and toward socialization of American Industry.
>
> Perhaps legislation by Congress is necessary to proscribe [sic] sound restrictions under which such benefit plans can operate; but, if it is, we as business men and Americans must see that such legislation is passed.

(Defs.' Ex. BB at 15.)

Thus, given the fact of continued provision of health care to UMWA-represented retirees, as well as the pervasive nature of the government's regulation of virtually every facet of the coal mining industry, multiemployer benefit funds in general, and the UMWA Funds in particular, any expectation that any NBCWA signatory may have had that it could freely and forever walk away from its responsibilities to the UMWA retirees, and dump its share of the liabilities onto operators that were still contributing to the UMWA 1950 and 1974 Benefit Trusts, was clearly unreasonable. Because Plaintiffs have failed to satisfy any of the three factors suggested by *Connolly*, 475 U.S. at 225, 106 S.Ct. at 1026, or, for that matter, suggested any other viable basis upon which to build a successful Takings Clause challenge, the court finds that this portion of Plaintiffs' claim must fail as well.

IV. Conclusion

In mounting a constitutional challenge to an Act of Congress, a plaintiff must establish a violation more substantial than the mere allegation that the method chosen by Congress to correct a particular problem was not the best method available. The courts of the United States do not sit in judgment of legislative prerogative, so long as that prerogative has some rational basis and is not so invasive as to constitute a "taking." In the instant case, for the reasons stated above, Plaintiffs have failed to meet their heavy burden of establishing that the Coal Act is

violative of either the Due Process or Takings Clauses of the Fifth Amendment to the United States Constitution. Whether the Coal Act is the fairest or most reasonable solution to the problems Congress sought to resolve is a question for politicians, philosophers and editorialists, not for this court. Accordingly, Plaintiffs' motion for summary judgment is hereby DENIED and Defendants' cross-motions for summary judgment are hereby GRANTED. Judgment will be entered in a separate order accompanying this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TH 93-158-C-T/H

TEMPLETON COAL COMPANY, INC., SHERWOOD-TEMPLETON COAL COMPANY, INC., PRINCETON MINING COMPANY, and BERWIND CORPORATION, *Plaintiffs,*

vs.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, *Defendant.*

UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND and its Trustees, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD, *Intervenor-Defendants.*

ORDER OF JUDGMENT

For the reasons stated in the entry accompanying this order, Plaintiffs' motion for summary judgment is hereby DENIED and Defendants' cross-motions for summary judgment are hereby GRANTED. Accordingly, the court finds that Plaintiffs' challenge to the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 must fail. JUDGMENT is hereby entered in favor of Defendant and Intervenor-Defendants and against Plain-

tiffs, Templeton Coal Company, Inc., Sherwood-Templeton Coal Company, Inc., Princeton Mining Company, Inc. and Berwind Corporation.

ALL OF WHICH IS ENTERED this 4th day of April 1995.

/s/ John Daniel Tinder
JOHN DANIEL TINDER
Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
S.D. INDIANA
TERRE HAUTE DIVISION

No. TH 93-158-C

TEMPLETON COAL COMPANY, INC., SHERWOOD-TEMPLETON COAL COMPANY, INC., PRINCETON MINING COMPANY, and BERWIND CORPORATION, *Plaintiffs,*

v.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND and its Trustees, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O.S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD, *Defendants.*

Nov. 18, 1993

ENTRY FOLLOWING ARGUMENT ON REQUEST FOR PRELIMINARY INJUNCTION

TINDER, District Judge.

This suit involves a challenge to the constitutionality of a recently enacted piece of federal legislation affecting the funding of health care benefits for retirees of the coal industry. The suit is timely in the sense that in very recent days, Americans have undertaken a major public debate of health care costs and funding in this country.

The challenged statutory scheme is one method of allocating health insurance costs for one significant segment of the work force. The outcome of this suit will have no direct bearing on the focus of that debate. Nonetheless, the suit reflects the types of dilemmas posed by efforts to address these difficult issues facing workers and their dependents, employers, and the nation's lawmakers.

However, in another real sense, the suit is untimely. The Plaintiffs have been aware of their potential obligations under the legislative scheme since at least June of this year, and most likely had substantial information about the issues brought before the court in this suit well before that. Nonetheless, the Plaintiffs waited until September 2, 1993 to file this suit, less than thirty days before the threatened actions complained of were scheduled to begin, thus leaving little time for the Defendants to make a fair response to the Plaintiffs' requests for emergency injunctive relief, and an unsuitably short period of time for the court to consider the complex issues presented by the suit. Under the circumstances, the parties have done a remarkably good job of compiling documents and well written briefs for the court's consideration. The court heard oral arguments on September 30, 1993 at which counsel did an admirable job of elaborating their positions.[1]

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[1] The suit was filed while the assigned judge, the Honorable Larry J. McKinney, was presiding over an extended patent trial which was expected to last at least a month beyond the starting date of the claimed constitutional violations. Thus, I assumed responsibility for ruling on the request for preliminary injunctive relief. Because I have become familiar with the legal and factual issues in this case. I will retain responsibility for it, and the Clerk will be directed to make a transfer of case assignment. There is no point in duplicating the judicial preparation that has gone into the case thus far.

I. *FINDINGS OF FACT*[2]

The statutory scheme in question and the historical events leading up to its congressional enactment were ably described by Judge Graham in *Barrick Gold Exploration, Inc. v. Hudson*, 823 F.Supp. 1395 (S.D.Ohio 1993) and there is no point in reiterating his fine discussion. Accordingly, this court adopts the discussion by Judge Graham at pages 1398 through 1401 and supplements it with the following facts to the limited extent that the parties in this case present a slightly different factual scenario.

The Plaintiffs in this suit are four companies that were previously involved in the coal mining business. They each were signatories to collective bargaining agreements with the United Mine Workers of America ("UMWA") in the 1950s and 1960s.[3] Specifically, Templeton Coal

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[2] This entry addresses only the request for a preliminary injunction. The "findings" denominated here are only determined for purposes of this preliminary matter pursuant to the requirements of Fed.R.Civ.P. 51(a) and are based only on the affidavits, exhibits, and other documents submitted in an expedited manner in connection with the argument on the request for a preliminary injunction. Obviously, the court's views on these evidentiary matters are not binding at trial. A matter on which the court currently makes a finding may be determined differently after a full explication of evidence at trial.

[3] The Defendants present evidence regarding the federal government's involvement in health and benefit matters within the coal industry dating even further back into the 1940s, principally through submission of *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 100-101 (Comm.Print 1993) [*"Funding UMWA Orphan Retirees"*] (Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess.); *Coal Commission Report: A Report to the Secretary of Labor and the American People* 16-18 (Nov. 1990) [*"Coal Commission Report"*]. All of this appears to be a genuine historical discussion of labor and governmental relations in the coal industry and it is somewhat relevant that Congress had these reports available when it acted on this legislation. However, this court is able to evaluate the preliminary injunction questions without going beyond the first agreement signed by these Plaintiffs.

Company, Inc. ("Templeton"), Sherwood-Templeton Coal Company, Inc. ("Sherwood"), and Princeton Mining Company, Inc. ("Princeton") bargained with the UMWA through the Indiana Coal Operators' Association ("ICOA"), an independent multiemployer bargaining association. Berwind Corporation ("Berwind") (formerly known as Berwind-White Coal Mining Company) bargained with the UMWA through the Central Pennsylvania Coal Producers' Association ("CPCPA"). The Bituminous Coal Operators' Association ("BCOA"), a multiemployer bargaining association, was formed by many of the UMWA coal mine operators and became the primary negotiator with the UMWA after 1951. Berwind was a member of BCOA between 1955 and 1962. The other three Plaintiffs were never BCOA members, but shadowed the BCOA's activities by membership in ICOA, a similar multiemployer bargaining association.

All four Plaintiffs were signatories to the 1950 National Bituminous Coal Wage Agreement ("NBCWA") and subsequent amendments thereto in 1951 and 1952. The NBCWA was also amended in 1955, 1956, 1958, 1964, and 1966, but the Plaintiffs' connections to those agreements after 1952 varied. Templeton ceased mining operations prior to the 1955 Amendment and consequently was not a signatory to it or any subsequent amendments to the NBCWA. Sherwood and Berwind were signatories to the 1955, 1956, and 1958 Amendments. Sherwood ceased mining operations with UMWA miners in 1960. Berwind ceased coal mining altogether in 1962. Thus, Sherwood and Berwind did not sign the 1964 or 1966 Amendments or any subsequent NBCWA. Princeton signed all the amendments through 1964, but ceased mining before the 1966 Amendment and did not sign any subsequent NBCWAs.

As discussed by Judge Graham in *Barrick Gold Exploration*, the enactment of the Coal Industry Retiree Health Benefit Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, 3036-3056 ("the 1992 Coal Act" or "the

Coal Act"), occurred in October of 1992, and it was subsequently codified at 26 U.S.C. § 9701 et seq., as part of the Energy Policy Act of 1992. The Coal Act substantially affects the Plaintiffs, and they seek an injunction against its enforcement against them and a judgment that it violates the Due Process and Takings Clauses of the United States Constitution as applied to them.

The 1950 NBCWA established the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W & R Fund"). According to undisputed affidavits submitted by the Plaintiffs, when each of them ceased mining coal with UMWA-represented employees, they had fully complied with their obligations to contribute to the 1950 W & R Fund. The 1950 W & R Fund was created as an irrevocable trust under Section 302(c) of the Labor-Management Relations Act of 1947. According to the 1950 NBCWA, the 1950 W & R Fund was to provide "benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness . . . [and] benefits on account of sickness, temporary disability, permanent disability, death or retirement." 1950 NBCWA at 136. Sole discretion regarding the scope and duration of the benefits that employees might receive as a result of the 1950 W & R Fund belonged to the trustees of the 1950 W & R Fund. The principal obligation of the mine operator signatories to the 1950 NBCWA, including the Plaintiffs, was to contribute into the 1950 W & R Fund thirty cents per ton of coal mined. The duration of this obligation continued for the life of the agreement.

None of the amendments to the NBCWA in 1951, 1952, 1955, 1956, 1958, or 1964 changed the terms regarding providing health benefits to retirees under the 1950 NBCWA except that the 1952 Amendment increased the per-ton contribution to forty cents, which carried over to the succeeding agreements. The 1964

Amendment added a requirement that eighty cents per ton be contributed for coal purchased from non-UMWA operators.

Essentially, subsequent NBCWAs through 1974 maintained the general elements of the 1950 W & R Fund as the exclusive provider of health and other welfare benefits for both active and retired UMWA miners and their dependents. The first significant change occurred in the 1971 NBCWA when the trustees were directed to extend benefits at levels set by the BCOA and the UMWA, rather than at levels determined by the trustees as was previously done. Substantially more radical changes developed as a result of the 1974 NBCWA. That agreement converted the 1950 W & R Fund into an entity known as the UMWA 1950 Pension Trust. The 1974 NBCWA also created two other plans relevant to this proceeding: [4] the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Fund") and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Fund'). These Benefit Funds provided health and other non-pension benefits to covered miners who retired before January 1, 1976 (1950 Benefit Fund) or after January 1, 1976 (1974 Benefit Fund). The assets of the 1950 W & R Fund were transferred to the UMWA 1950 Pension Trust so that both Benefit Funds started with a zero funding base. The funding for the two new Benefit Funds were to come from BCOA members and other signatories to the 1974 NBCWA. However, perhaps the most revolutionary change brought by the 1974 NBCWA was the explicit promise that a covered retired miner would retain health benefits for life. The class of beneficiaries entitled to benefits also was expanded to include all surviving spouses of UMWA retirees, rather than just widows of miners killed in mines as was previously the case.

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[4] The 1974 NBCWA also created a third plan, namely, the UMWA 1974 Pension Trust. However, that trust has no bearing on this suit.

The next NBCWA—the 1978 version—brought about still more changes in UMWA retiree health benefits. As a result of the 1978 NBCWA, the source of benefits for UMWA miners who retired before January 1, 1976 was unchanged—the 1950 Benefit Fund. Miners who retired on or after January 1, 1976 would receive benefits from individual plans established and financed by the signatories to the 1978 NBCWA. The 1974 Benefit Fund was relegated to being used to provide benefits to miners who retired on or after January 1, 1976 and who were "orphaned" because their operators were no longer in business. The 1978 NBCWA also contained what has become known as the "guarantee clause," subsequently interpreted to obligate signatory mine operators (and signatories to all subsequent NBCWAs) to make sufficient contributions to insure payment of the benefits that had been promised for life in the 1974 NBCWA.[5]

The Plans for both the 1950 and 1974 Benefit Funds were modified to add what has become known as the "evergreen" clause, requiring continuing contributions in connection with the 1978 NBCWA.[6]

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[5] The relevant portion of that clause reads:

> Guarantee of 1950 Plans and Trusts and 1974 Plans and Trusts
>
> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.
>
> In order to fully fund these guaranteed benefits, the BCOA may increase, not decrease, the rate of contributions to be made. . . . These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

[6] The so-called "evergreen" clause provides that:

> Any Employer who employed any Participant eligible for coverage under, or who received or receives benefits under, the (1950/1974) Benefit Plan and Trust, or any Employer who was

The next NBCWA—in 1988—added withdrawal liability for signatories to that agreement. That liability provision required employers withdrawing from the Benefit Funds to pay an actuarially determined amount to cover the future costs of retirees left uncovered by the withdrawal.

During the late 1970s and 1980s, the adequacy of funding for the Benefit Funds came into question. A number of large coal operators who had signed the 1978 and subsequent NBCWAs began terminating their participation in the Benefit Funds. This put a great demand on the 1974 Benefit Fund because the retirees of these non-participating operators drew their benefits from the 1974 Benefit Fund in growing amounts. The remaining employers had to pay drastically increasing contributions to keep the Benefit Fund afloat. The financial burden to remaining NBCWA signatories became an ever increasing incentive to withdraw from the Benefit Fund.

During the same era, the cost of health care continued to rise. This was accompanied by a substantial decrease in the amount of coal being produced by NBCWA operations. Almost simultaneously, large numbers of miners hit retirement age while the number of mine operators dwindled. The Plaintiffs submit that fraud and mismanagement also plagued the Benefit Fund. No matter what the cause, a true crisis point was reached in the funding of coal-industry retiree health benefits by the beginning of the 1990s. The controversy was most dramatically demonstrated in the protracted strike against the Pittson Coal Company and related entities. Following the settlement of that strike, the Secretary of Labor, Eliza-

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or is required to make, or who has made or makes contributions to the (1950/1974) Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the (1950/1974) Benefit Trust, as amended from time to time, including, but not limited to making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto.

beth Dole, formed the Coal Commission (formally denominated as the Advisory Commission on United Mine Workers of America Retiree Health Benefits) to examine and report on this problem. The resultant written Coal Commission Report is in the record of the preliminary injunction proceedings. As might be expected, the Commission was in substantial agreement in identifying the rising cost of paying for the "orphan" retirees as the principal cause of the mine workers health-care funding crisis. In fact, it was projected that the 1950 and 1974 Benefit Funds would accumulate a combined deficit of $300 million by the end of 1993 if no action was taken. However, there was a divergence of opinion on when retiree health-care benefits had become an obligation of mine operators and on how to finance the retiree health benefits. The Report was made available to Congress and it supplemented other information gathered in connection with hearings held in the United States Senate on this problem. The debate on this subject continued in Congress. In substantial part, the 1992 Coal Act was designed to ameliorate the coal industry retiree health care funding predicament.

Only one of the three funding mechanisms created by the 1992 Coal Act is at issue in this case, specifically the UMWA Combined Benefit Fund ("Combined Fund"). 1992 Coal Act §§ 9702, 9711, 9712. The Combined Fund is a statutory merger of the 1950 Benefit Fund and the 1974 Benefit Fund. *Id.* § 9702(a)(2). $70 million was transferred into the Combined Fund from the 1950 Pension Trust on February 1, 1993. The Pension Trust will transfer an additional $70 million into the Combined Fund at the beginning of each of the next two fiscal years. Beginning on October 1, 1995, the Abandoned Mine Reclamation Fund will transfer as much as $70 million or more to the Combined Fund and will continue to do so for each year through 2003. These transferred funds are to be used to reduce the amounts contributing employers would otherwise be required to

pay to the Combined Fund. The Combined Fund is also authorized to be subsidized by health insurance premiums and death benefit premiums paid by each "assigned operator." *Id.* §§ 9704, 9705. An "assigned operator" under the 1992 Coal Act is a signatory to *any* NBCWA since 1950. *Id.* § 9701(c)(5). Liability is to be "assigned" by the Secretary according to the beneficiaries' degree of prior employment with a signatory to any NBCWA since 1950. *Id.* § 9706(a), (b)(1). The Secretary also is required to assess a proportionate premium to each assigned operator to pay for the costs of health benefits for "unassigned beneficiaries"—the "orphans," that is, the retirees (and surviving spouses and dependents of retirees) of employers who no longer are in business of any kind. *Id.* § 9704(d), (f). The level of benefits provided under the 1988 NBCWA will be maintained. *Id.* § 9703(b). Premiums must be paid every year while all beneficiaries remain living. *Id.* § 9704.

The signatories to the 1988 NBCWA are obligated to pay the "start-up" costs of the Combined Fund for the period February 1, 1993 to September 30, 1993, but thereafter each "assigned operator" will be charged a share of these costs and the signatories to the 1988 NBCWA will get an offset for their start-up contributions against future funding obligations. *Id.* § 9704(g), (i)(3).

The apparent purpose of the 1992 Coal Act is to provide funds for UMWA retiree health care benefits through the private sector. The Plaintiffs emphasize that the Coal Act is premised on the specific legislative finding that:

> [T]o secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Energy Policy Act § 19142(a)(2).

As a result of the Coal Act, every coal operator (present and former) that signed any NBCWA from 1950 through 1988 and that is still in existence in any form is obligated to contribute to the new statutory benefit fund. 1992 Coal Act § 9701(c)(5).

It appears that the Secretary has, at least for the most part, completed the assignment process and has designated "assigned" and "unassigned" beneficiaries as required by the Coal Act. As a result, most of the Plaintiffs have been notified that they are responsible for paying insurance premiums for a certain number of former employees—including surviving spouses and dependents —("assigned beneficiaries") and a number of "orphans" ("unassigned beneficiaries").[7] Templeton was assigned 52 beneficiaries, Princeton 196, and Berwind 1,269.[8] These are substantially larger numbers than the Plaintiffs had expected as of the filing of this suit, and the Plaintiffs contend that the assignments are not accurate.

The Coal Act provides a method for administrative relief from incorrect assignments and that issue is not before the court on this preliminary injunction matter. However, the assigned premiums must be paid even during an administrative challenge of the assignment. A penalty of $100 per day, per beneficiary, for unpaid assignments faces the Plaintiffs. *Id.* § 9707(b). Obviously, these assignments will decrease over the years as beneficiaries die, but the Secretary estimates present expense per beneficiary to be somewhere between $2000 and $2300. The Plaintiffs argue that the liability for some beneficiaries could continue for up to thirty years. The initial payments were to be submitted to the Combined Fund by October 25, 1993. *Id.* § 9704(g).

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[7] It does not appear that a premium payment will be required for the unassigned orphans at the present time. The transfer of funds from the 1950 Pension Fund appears to have covered the orphans' premiums for the first year of this program.

[8] The court has not been informed of Sherwood's assignments.

It is this so-called "reachback" liability imposed by § 9704 of the Coal Act that is challenged in this suit. The Plaintiffs contend that none of the NBCWAs they signed obligated them to make any retiree health insurance benefits after their participation in the coal mining business terminated. They build on their argument by pointing out that all of the provisions of post-1964 NBCWAs that Congress believed to be the basis for imposing "reachback liability"—the lifetime duration, the guarantee clause, the evergreen provisions, and withdrawal liability—all were instituted in agreements entered after they left the industry. Their position is simple —they didn't agree to this liability, and Congress can't (constitutionally) make them responsible for it. However, even after the Plaintiffs stopped contributing to the 1950 W & R Fund, their retired employees and subsequently retiring persons who had worked for the Plaintiffs at various times continued to receive benefits from the Benefit Fund. In effect, this resulted in a shift of the responsibility for financing health benefits for the Plaintiffs' former employees to the coal mine operators who continued to participate in the Benefit Fund. There is a strong indication that Congress assumed that all signatories to NBCWAs since 1950 had committed lifetime health benefits to UMWA retirees without qualification.[9]

The Defendants need little introduction. Defendant Shalala is here by virtue of the duties required of her by the Coal Act. The intervening Defendants, the United Mine Workers of America Combined Fund and its Trustees, Marty D. Hudson, Michael H. Holland, Elliot A.

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[9] The Plaintiffs have pointed to multiple comments by Senators which suggest such an assumption. *See, e.g.*, 138 Cong.Rec. S10,784 (daily ed. July 29, 1992) (statement of Sen. Byrd) ("[t]his amendment . . . says that when promises are made, promises will be kept"); *id.* at S10,785 (statement of Sen. Byrd) (Act's goal is "to protect the retirees who were promised lifetime benefits"); *id.* at S10,786 (statement of Sen. Wofford) ("retired miners are entitled to the health care benefits they were promised").

Segal, Thomas O.S. Rand, Carlton R. Sickles, Gail R. Willensky, and Michael Hobgood, are parties because I have determined them to be necessary to this litigation: they are charged with the responsibility of collecting and receiving the insurance premiums in question and with administering the health benefits in question. The Defendants are familiar litigants on the questions involved here because they were also defendants in *Barrick Gold* before Judge Graham and most likely are parties in the other suits involving the Coal Act presently pending in various federal courts.

II. *CONCLUSIONS OF LAW* [10]

The Defendants do not dispute the financial impact of the Coal Act asserted by the Plaintiffs, except that the Defendants point out that transferring funds from the Combined Funds will defer, if not complete, the Plaintiffs' payment obligations as to the "orphans." Nonetheless, no significant challenge is raised to the Plaintiffs' standing to bring this suit or the jurisdiction of this court to consider it. The matter is clearly ripe for adjudication because the assignments and assessments have been made and the premiums are now due.

The parties are also in general agreement with the historical background described by Judge Graham in *Barrick*

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[10] Most significant of all of the court's conclusions is the ultimate conclusion that a preliminary injunction should not be granted. This surely will come as a surprise to the parties since the court issued a preliminary injunction on October 25, 1993—albeit without the necessary reasons and findings required by Rules 52 and 65(d) of the Federal Rules of Civil Procedure. However, while preparing this entry, the court continued to carefully consider the issues involved and has *sua sponte* reconsidered the issuance of the injunction. When originally issuing the injunction, the court was reading the Due Process and Takings cases too narrowly. The court will issue a separate order dissolving the injunction within a short time to allow the Plaintiffs to make the payment arrangements required without undue interruption.

Gold, although they may dispute whether the current state of underfunding of the miners' welfare benefits results from fraud and mismanagement or increasing costs combined with a diminution in the number of contributors to the Benefit Funds. They are in substantial agreement as to the preliminary injunction standards to be applied by a district court sitting in this circuit—except that, of course, they reach drastically different results in the application of those standards. Nonetheless, an extended discussion of the oft-cited relevant standards is unnecessary. The appropriate formulation for the review of a request for a preliminary injunction has been stated clearly by the Seventh Circuit Court of Appeals in countless decisions. This court's application of that standard in the context of a constitutional challenge to a statutory enactment has also been discussed at length in a prior opinion, so reiteration of that formula is needless. *See Government Suppliers Consolidating Servs., Inc. v. Bayh*, 734 F.Supp. 853 at 862 (S.D.Ind.1990). As will be indicated below, the preliminary injunction question is decided by a consideration of whether Plaintiffs have shown a reasonable likelihood of prevailing on the merits.

Without further adieu, the heart of this dispute can be reached quickly. The Plaintiffs want the portion of the Coal Act that would require them to pay health insurance premiums for their former employees and the "orphans" declared unconstitutional. They base their challenge on both the Due Process and Takings Clauses of the United States Constitution. Their challenge is slightly different than the one raised in *Barrick Gold*. The plaintiffs in *Barrick Gold* were also former coal mine operators who had terminated their coal mine operations *after* becoming signatories to the 1988 NBCWA. The Plaintiffs in this case, by contrast, have not signed an NBCWA in the last thirty to forty years. A lot has happened, they argue, in those three to four decades to materially alter the NBCWAs subsequently entered—specifically, the development of the 1974 Benefit Fund and the adoption of the

guarantee and evergreen clauses and the contractual withdrawal-liability provision. They contend that their liability to former employees terminated when their employment of miners under the NBCWAs to which they were signatories ended. They argue that the Constitution precludes assessment of current liability against them because they did not agree to such exposure in the contracts they entered. The Plaintiffs' constitutional challenge is clearly an attack on § 9704 only, and only to the extent "as applied" to them, rather than a facial challenge to the constitutionality of the entire statutory scheme.

A) *LIKELIHOOD OF SUCCESS ON THE MERITS*

1.) *DUE PROCESS*

On course, the challenged provision begins with a strong presumption of constitutionality. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). The burden is on the Plaintiffs in bringing their complaint alleging a due process violation to establish that Congress acted in an arbitrary and irrational way in connection with economic legislation. *See, e.g., id.* at 15, 96 S.Ct. 2892; *Ferguson v. Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). Great deference is paid to the legislative decisions of Congress. The Plaintiffs' due process of law challenge can prevail only if they show the questioned statute to be arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. *Nebbia v. New York,* 291 U.S. 502, 539, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934). The statute will stand if a rational relationship exists between it and a legitimate governmental objective. *Id.* at 537, 54 S.Ct. at 516.

Thus, the broad extent of congressional power is limited only by the constraints of a rational relationship between the enactment and an appropriate goal of govern-

ment. The legislative will can wander broad prairies. Given the low level of scrutiny applied to federal legislation allocating the burdens and benefits of economic life, it is not surprising that virtually every substantive due process challenge to economic legislation has failed since *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 354, 55 S.Ct. 758, 764, 79 L.Ed. 1468 (1935), and the vitality of *Alton* has been, to put it mildly, severely questioned. *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir.1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984). The string of unsuccessful challenges to economic legislation seems endless. *See, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). Some even speculate that economic regulations can never be found to be irrational. *Central States Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1343 (7th Cir.1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992). So why should this case be different? Have these Plaintiffs shown that their claim clears the seemingly insurmountable hurdles of irrationality and arbitrariness? The Plaintiffs focus on several aspects of the Coal Act to distinguish this case from the hordes of other failed endeavors.

First, the Plaintiffs frame their argument as though the Coal Act is retroactive legislation as applied to them. Simply put, they contend that their sole commitment to funding health benefits was a fixed per-ton contribution and the last ton giving rise to such an obligation was mined decades ago. Analogizing to the subsequently created pensions in *Alton*, the Plaintiffs contend that the retiree health benefits are the supplementation of an earlier wage already paid to the retirees. If the legislation is retroactive, a greater justification will be required in a

due process test. *Turner Elkhorn*, 428 U.S. at 17, 96 S.Ct. at 2893.

However, the conclusion that the Coal Act is retroactive is not so easily reached. Certainly, the Plaintiffs are assessed liability for retiree health benefits because of their prior coal mining activity under NBCWAs. The utilization of previously existing facts to regulate subsequent action is not necessarily retroactive legislation. *Reynolds v. United States*, 292 U.S. 443, 449, 54 S.Ct. 800, 803, 78 L.Ed. 1353 (1934). As the Intervening Defendants noted, when a statute merely relates to current and future conditions and neither punishes past wrongdoing nor imposes liability for past acts, the statute simply is not retroactive. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984, 996 (D.S.C. 1984), *aff'd in part, vacated and remanded on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). In other words, liability imposed for present and future conditions arising out of past conduct is not *per se* retroactive. *United States v. Northeastern Pharm. & Chemical Co.*, 810 F.2d 726 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987). The assessment of retiree health insurance liability because of prior employment of miners is more correctly analogized to the imposition of liability for correcting existing environmental problems based on prior conduct than to the requirement of an increase of benefits for work previously performed. However, retroactivity alone would not doom the Coal Act under the Due Process Clause. *Turner Elkhorn*, 428 U.S. at 16, 96 S.Ct. at 2892. Retroactive application of an economic burden can still be based on a rational legislative purpose. *R.A. Gray*, 467 U.S. at 717, 104 S.Ct. at 2709.

Next, the Plaintiffs argue strenuously that the agreements they signed contained nothing more than defined

contribution requirements, setting a per-ton amount to be paid into a welfare plan for a finite period of time, specifically, for the term of the agreements. Distribution of the benefit proceeds was left entirely to the trustees' discretion, and the Plaintiffs made no commitment that reasonably can be construed to have promised, suggested, or implied that the welfare benefits (or the funding for those benefits) would continue for the lives of their employees. They also point to the fact that the plan to which the Plaintiffs contributed—the 1950 W & R Fund —was effectively dissolved and folded into the UMWA 1950 Pension Trust by the 1974 NBCWA. The Plaintiffs further contend that all of the commitments made by coal mine operators that have given rise to claims of lifetime welfare benefits by retirees—the guarantee clause, the evergreen clause, and withdrawal liability—were made by other operators in agreements signed ten years and more after any of the Plaintiffs signed their last agreement. The Plaintiffs contend also that they never committed to funding welfare benefits for spouses or the "orphans" who were not directly employed by them. They argue that these substantial expansions of coverage occurred well after the Plaintiffs had moved from mining UMWA mines to other endeavors.

However, the Plaintiffs' document-by-document and line-by-line approach in arguing their contractual commitments applies a far narrower standard than Congress must use in dealing with an economic problem. The Plaintiffs' arguments would be more suited to an attack on state legislation under the Contracts Clause. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13, 97 S.Ct. 1505, 1515 n. 13, 52 L.Ed.2d 92 (1977). Congress is entitled to consider a broad range of information and concerns in evaluating the need for legislation. It is not limited to the precise language of the contractual documents in considering whether the coal industry as a whole should carry the burden of retiree health-care benefits. *See Concrete Pipe & Prods. v. Construction Laborers*

Pension Trust, —— U.S. ——, ——, 113 S.Ct. 2264, 2289, 124 L.Ed.2d 539 (1993); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-224, 106 S.Ct. 1018, 1025-1026, 89 L.Ed.2d 166 (1986). If Congress interpreted the NBCWAs and the history of health-care coverage in the coal industry as entitling retirees to lifetime benefits, it would not have been alone. *See UMWA v. Nobel*, 720 F.Supp. 1169 (W.D.Pa.1989), *aff'd without opinion*, 902 F.2d 1558 (3rd Cir.1990), *cert. denied*, 499 U.S. 904, 111 S.Ct. 1102, 113 L.Ed.2d 212 (1991).

Despite the Plaintiffs' focus on the legislative intent to identify those responsible for retiree health benefit liabilities, they failed to show that it is irrational that Congress determined that operators under the NBCWAs of the 1950s and 1960s were at least in some part accountable. The dispute about when lifetime health benefits were promised to retired mine workers and by whom is a multi-sided contest, pitting coal mine operators from different eras against each other, as well as involving present and former mineworkers and their families. A congressional decision to come down on the side of the retirees and their spouses and dependents is not totally void of reason. It may not be the best or fairest choice, but it is not irrational or arbitrary in the constitutional sense.

The Plaintiffs attempt to distinguish *Turner Elkhorn*, which affirmed the responsibility of mine operators to fund a compensation scheme for those afflicted with Black Lung disease as a result of coal mine work. The Plaintiffs argue that the Black Lung compensation scheme made each operator responsible only for the expenses related to its own workers, whereas the Coal Act imposes liability for the "orphans" with whom the Plaintiffs had no direct employment connection. However, this argument ignores that the Plaintiffs benefitted from the pool of available UMWA workers, even if it only hired some of them. The availability of health-care benefits may have

contributed to the existence of that workforce pool. The Plaintiffs' narrow reading of *Turner Elkhorn* ignores subsequent recognition of pooled responsibilities. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

The Plaintiffs also argue that they cannot be held responsible for retiree health benefits at this late date because they did not control the benefit fund to which they did contribute. They point to the fund trustees as the responsible parties for the funding crisis faced by Congress. This view fails to consider that the Plaintiffs' retirees (including those miners who accumulated only some of their retirement credits while working for the Plaintiffs) drew benefits from the fund long after the Plaintiffs terminated their contributions. Further, because it was the practice to pay retiree health benefits, this drain on the fund could have been expected. To the extent that Congress could have found that mine operators who terminated welfare contributions in the 1950s and 1960s "dumped" their future retirees on the operators who continued to make contributions, a legislative decision to recognize responsibility for that "dumping" cannot be said to be totally irrational. There may be many parties responsible for the underfunded condition of mine worker retiree health plans as Congress addressed the problem in 1992. It is not an appropriate function of the courts to evaluate whether Congress most correctly and fairly assessed the blame for that crisis when it enacted the Coal Act. The Plaintiffs' due process challenge fails unless they can show that responsibility was placed on them in a completely irrational manner. To this point, they have not done so.

In reviewing the Coal Act, the court is not limited to measuring the law against the stated purpose. A due process test is not whether the legislation meets an explicitly stated legitimate governmental purpose. Instead, the more appropriate question is whether the legislation

serves any *hypothetical* legitimate purpose. *Northside Sanitary Landfill, Inc. v. City of Indpls.*, 902 F.2d 521, 522 (7th Cir.1990).

Here, the legislation appears to stand up to a due process challenge measured by either the stated purpose or a hypothesized reason. It holds those responsible, if only in part, liable. Congress is well within its authority in viewing the history of collective bargaining in the mining industry to determine that operators like these Plaintiffs created an atmosphere that promised lifetime health benefits to those who would retire from the industry. In return, such operators received labor at the time. But even if that reason is not good enough, Congress had a wide variety of choices when confronted with this subject. It could have ignored the problem and allowed the miners and operators to continue to battle over this intractable predicament at bargaining tables and on picket lines. It could have decided that the population as a whole could pay for the retiree benefits through the expenditure of tax revenues. It could have levied a special tax on coal being mined or used in the future. The potential choices could be endless. Congress chose to impose this financial burden, at least in part, on the Plaintiffs. While the Plaintiffs have presented very good arguments demonstrating that this was not the best choice, they have not shown that it makes no sense at all. Placing the burden on the Plaintiffs by the Coal Act is certainly more rational than selecting cattle ranchers or used car dealers to pay for UMWA retiree health benefits. The Plaintiffs did work in the industry at one time. Perhaps even without more, that is enough to keep their connection with the current financial obligation from being considered arbitrary and void of reason. But there is more, as discussed above.

2.) *TAKINGS*

With regard to the Plaintiffs' "takings" challenge, the degree of deference to legislative action may not be as

great as compared to the due process challenge, but the Plaintiffs' burden of making out a case under that theory is not slight. *See Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986). Given the court's determination that the Plaintiffs are not likely to prevail on the merits of the due process claim, it is not surprising that their "takings" theory would suffer the same fate at this preliminary stage of the case. Plaintiffs frame their takings argument around the three-factor test discussed in *Connolly*, namely, "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with investment backed expectations'; and (3) 'the character of the governmental action.' " *Id.* at 225, 106 S.Ct. at 1026 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978)). It really is not disputed that the Coal Act will cost the Plaintiffs a significant amount of money.

It is farily estimated that the Plaintiffs' payment obligations could continue for thirty or more years. However, the mere requirement of paying funds is not enough to make out a taking. The Plaintiffs would also have to show that the required payments will be completely out of proportion to their activity under the NBCWAs. *Id.*, 475 U.S. at 226, 106 S.Ct. at 1027. The Plaintiffs' financial burden under the Coal Act is certainly lessened to some degree by the transfers from the 1950 Pension Trust and the Reclamation Fund. For the reasons discussed in connection with the due process challenge, the Plaintiffs have not met their burden on this question. Regarding the interference with investment-backed expectations, this court takes the Plaintiffs' argument to be nothing more than a statement that they have gone on to do other things since abandoning coal mining. They have not shown that reliance on the language of the NBCWAs justified an expectation that they would never have responsibilities to their own retirees or to others

retiring from that industry. That argument was laid to rest in *Connolly*. *Id.* at 223, 106 S.Ct. at 1025. Finally, the question of the character of the governmental act was also disposed of in *Connolly*. Much like the Multiemployer Pension Plan Amendments Act discussed in *Connolly*, the Coal Act adjusts the benefits and burdens of economic life to further a common benefit—in this instance, health care for retirees from the industry from which the Plaintiffs withdrew. There is no physical invasion or permanent appropriation of the Plaintiffs' assets for the government's own use. *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, —— U.S. ——, at ——, 113 S.Ct. 2264, at 2290, 124 L.Ed.2d 539 (1993). In short, the Plaintiffs' showing under the Takings Clause does not justify issuing a preliminary injunction. They have not shown even a negligible chance of prevailing on that claim.

III. *CONCLUSION*

Having said the above, this court is quick to caution that its discussion of these issues is limited to the facts brought before it in the exaggeratedly rapid atmosphere of a preliminary injunction proceeding brought at a time and in a manner to hit the court just as the challenged legislation was about to have a direct financial impact. The court has had little time to consider this matter, and it is well aware that a ponderous weight of authority sits on the side of all economic regulations. On a fully developed record, this court's view of the evidence may be different. Of course, at this stage, the Plaintiffs needed to show that they have more than a slight chance of ultimately prevailing on the merits. *Roland Machinery Co. v. Dresser Ind., Inc.*, 749 F.2d 380, 387 (7th Cir.1984) quoting *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir.1982). Given the vast authority of Congress in allocating the benefits and burdens of social and economic issues, this court cannot anticipate even that slight chance at present. Even if

slim, some rationality of the legislative scheme as it affects these Plaintiffs is present. However, the legislative scheme presented by the "reachback" provisions of the Coal Act must be at the very edge of the broad range of permissible legislative allocation of specific economic burdens. Perhaps it is over that edge, although it does not appear to be so at this early stage in the proceedings. The extreme length of the "reachback" is remarkable, and the court can find no case exactly like this one. The imposition of retiree health care costs on the Plaintiffs now, thirty or forty years after their exit from the industry, certainly has a draconian air about it. By no means does the court view the Plaintiffs' challenge to the Coal Act as a frivolous attack. However, the character of the decision to allocate responsibility for this economic burden to former participants in the industry does not seem to be different in character from the liability constitutionally imposed for Black Lung disease benefits, pension funding, and environmental contamination as discussed in the cases cited above. Accordingly, the preliminary injunction request is DENIED and the preliminary injunction previously issued on October 25, 1993 will be dissolved.

ALL OF WHICH IS ENTERED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TH 93-158-C

TEMPLETON COAL COMPANY, INC., SHERWOOD-TEMPLETON COAL COMPANY, INC., PRINCETON MINING COMPANY, and BERWIND CORPORATION,

Plaintiffs,

vs.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND and its Trustees, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD,

Defendants.

ORDER DISSOLVING OCTOBER 25, 1993 PRELIMINARY INJUNCTION AND DENYING PRELIMINARY INJUNCTION

On October 25, 1993, this court issued a preliminary injunction in this matter. As noted in an entry issued this date, that injunction was incorrectly issued, and should have been denied. Accordingly, for the reasons stated in today's entry, the preliminary injunction previously issued will be DISSOLVED, effective as of November 30, 1993.*

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* The reason that the preliminary injunction is not being dissolved immediately is to allow the Plaintiffs to make appropriate

FURTHER, the Plaintiffs' request for a preliminary injunction is DENIED for the reasons indicated in today's entry.

ALL OF WHICH IS ENTERED this 18th day of November 1993.

/s/ John Daniel Tinder
JOHN DANIEL TINDER
Judge
United States District Court

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arrangements to pay the assessments due without incurring late payment penalties. This is only fair because the Plaintiffs were entitled to rely on the incorrectly issued injunction in delaying payments.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TH 93-158-C

TEMPLETON COAL COMPANY, INC., SHERWOOD-TEMPLETON COAL COMPANY, INC., PRINCETON MINING COMPANY, and BERWIND CORPORATION,

Plaintiffs,

VS.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND and its Trustees, MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, GAIL R. WILLENSKY, and WILLIAM P. HOBGOOD,

Defendants.

PRELIMINARY INJUNCTION

After review of the materials submitted and the arguments made, it appears that the Plaintiffs have met the requirements of Rule 65 of the Federal Rules of Civil Procedure. The detailed findings of fact and conclusions of law which support this determination will be issued in a separate memorandum. Therefore, it is ORDERED that the Plaintiffs' motion for injunctive relief is GRANTED.

It is further ORDERED that pending a final disposition on the merits in this action, or unless the terms of this Injunction are subsequently modified, the Defendants are enjoined as follows:

1. The Defendant Secretary is enjoined from assigning beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992 (the 1992 Coal Act) to any of the Plaintiffs; and

2. The assignments of beneficiaries under the 1992 Coal Act already made to the Plaintiffs as of this date shall be withdrawn by the Defendant Secretary; and

3. All Defendants are enjoined from taking any action to apply or enforce the 1992 Coal Act with respect to any of the Plaintiffs.

4. All Defendants are enjoined from assessing and/or attempting to collect any penalty from the Plaintiffs for failure to pay assessed premiums in a timely manner as long as the security requirements of this injunction are met by the Plaintiffs.

SECURITY

In order to secure the costs and damages which may be incurred or suffered if this injunction is wrongfully issued, the Plaintiffs will be required to post security pursuant to the provisions of Fed. R. Civ. P. 65(c). Said security shall consist of an amount equal to the assessed premiums under the 1992 Coal Act for all assigned beneficiaries as they have been assessed as of this date. This security may be posted by depositing funds with the Clerk of this court or by the filing of a surety bond in compliance with Fed. R. Civ. P. 65.1 in a form subject to the court's approval. The security is to be provided no later than the date the assessed premiums shall become due, except for the premiums due October 25, 1993. The security for the October 25, 1993 premiums shall be posted no later than November 1, 1993. This late posting exception is permitted solely to allow the Plaintiffs to make suitable arrangements for the security. If this injunction remains in effect as of the date of any future due dates for premiums as currently assessed, the security shall be increased in the amount of such future premiums as if the

assignments had not been ordered to be withdrawn by this preliminary injunction.

ALL OF WHICH IS ORDERED this 25th day of October, 1993.

/s/ John Daniel Tinder
JOHN DANIEL TINDER
Judge
United States District Court

APPENDIX G

STATUTORY PROVISIONS

SUBTITLE C—HEALTH CARE OF COAL MINERS

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"SUBTITLE J—COAL INDUSTRY HEALTH BENEFITS

"Subchapter A—Definitions of General Applicability

"Sec. 9701. Definitions of General Applicability.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.—

"(A) IN GENERAL.—The term 'UMWA Plan' means a plan—

"(i) which is described in section 404 (c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3) 1974 UMWA PENSION PLAN.—The term '1974 UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA BENEFIT PLAN.—The term '1992 UMWA Benefit Plan' means the plan referred to in section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section—

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section—

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means a person which is or was a signatory to a coal wage agreement.

"(2) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

"(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and

(iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

"(3) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

"(4) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(5) ASSIGNED OPERATOR.—The term 'assigned operator means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory oper-

ator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) BUSINESS.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term 'enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

"(3) TREATMENT OF PLAN.—The Combined Fund shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

"(b) BOARD OF TRUSTEES.—

"(1) IN GENERAL.—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"'(C) two individuals designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

"(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993, and end Septemper 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. Plan Benefits.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that consistent with paragarph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined under subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

"(II) the trustees elect to use to pay benefits for the current year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

"(3) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

"(4) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each

eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

"PART II—FINANCING

"Sec. 9704. Liability of Assigned Operators.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three permiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUMS.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

"(A) the amount determined by dividing—

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including

administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan begins exceeds such component for 1992.

"(3) ADJUSTMENTS FOR MEDICARE REDUCTIONS.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

"(c) DEATH BENEFIT PREMIUMS.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarilly determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

"(i) the excess of the premium credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes

of the carryover described in section 9703 (b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

"(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

"(C) NO AUTHORITY FOR INCREASED PAYMENTS.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

"(f) APPLICABLE PERCENTAGE.—For purposes of this section—

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENT.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and

all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.—

"(1) IN GENERAL.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(2) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.—

"(1) 1988 AGREEMENT OPERATORS.—

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred to the Combined Fund under section 9705(a) on February 1, 1993.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

"(ii) DEFICIT PAYMENTS.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the 'evergreen clause' found in the language

of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

"(iii) LIMITATION.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

"(iv) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premimum reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"(3) STARTUP COSTS.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

"Sec. 9705. Transfers.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN.—

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993.

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER.—

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1)—

"(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

"(5) TREATMENT OF TRANSFER.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND.—

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under

section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under seciton 9704(a)(3) of each assigned operator for the plan year in which transferred.

"Sec. 9706. Assignment of Eligible Beneficiaries.

"(a) IN GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal

industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested

information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under subsection (e)(2) with re-

spect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III—ENFORCEMENT

"Sec. 9707. Failure to Pay Premium.

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations.

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

"Subchapter C—Health Benefits of Certain Miners

"PART I—INDIVIDUAL EMPLOYER PLANS

"Sec. 9711. Continued Obligations of Individual Employer Plans.

"(a) COVERAGE OF CURRENT RECIPIENTS.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

"(b) COVERAGE OF ELIGIBLE RECIPIENTS.—

"(1) IN GENERAL.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

"(2) COVERAGE.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

"(c) JOINT AND SEVERAL LIABILITY OF RELATED PERSONS.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).

"(d) MANAGED CARE AND COST CONTAINMENT.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

"(e) TREATMENT OF NONCOVERED EMPLOYEES.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

"(f) ELIGIBILITY BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

"(g) RULES APPLICABLE TO THIS PART AND PART II.—For purposes of this part and part II—

"(1) SUCCESSOR.—The term 'last signatory operator' shall include a successor in interest of such operator.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

"PART II—1992 UMWA BENEFIT PLAN

"Sec. 9712. Establishment and coverage of 1992 UMWA Benefit Plan.

"(a) CREATION OF PLAN.—

"(1) IN GENERAL.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

"(2) TREATMENT OF PLAN.—The 1992 UMWA Benefit Plan shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(b) COVERAGE REQUIREMENT.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for bene-

fits under the Combined Fund and shall not provide such coverage to any other individual.

"(2) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means an individual who—

"(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

"(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

"(c) HEALTH BENEFITS.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) MANAGED CARE.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application

of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not liimted to, elements described in paragraph (3).

"(3) MAJOR ELEMENTS OF RULES.—Elements described in this paragraph are—

"(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

"(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

"(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

"(D) utilizing, in the claims payment function 'appropriateness of service' protocols under title XVIII of the Social Security Act if more stringent,

"(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

"(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

"(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

"(4) LAST SIGNATORY OPERATORS.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

"(5) STANDARDS OF QUALITY.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established—

"(A) by the settlors, or

"(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

"(d) GUARANTEE OF BENEFITS.—

"(1) IN GENERAL.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the

number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

"(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

"(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

"(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

"(2) ADJUSTMENTS.—The 1992 UMWA Benefit Plan shall provide for—

"(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

"(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

"(3) ADDITIONAL LIABILITY.—Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

"(4) JOINT AND SEVERAL LIABILITY.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

"(5) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(6) 1988 LAST SIGNATORY OPERATOR.—For purposes of this section, the term '1988 last signatory operator' means a last signatory operator which is a 1988 agreement operator.

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provision of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

Supreme Court, U.S.
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Nos. 95-1709 and 95-1751

In the Supreme Court of the United States

OCTOBER TERM, 1995

TEMPLETON COAL COMPANY, INC., *et al.*,
Petitioners,
v.
DONNA E. SHALALA, *et al.*

DAVON, INC.,
Petitioner,
v.
DONNA E. SHALALA, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES IN OPPOSITION

JOHN R. MOONEY
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, NW
Washington, DC 20005
(202) 783-0010

DAVID W. ALLEN
Office of the General Counsel
UMWA Health and Retirement Funds
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

PETER BUSCEMI
Counsel of Record
MICHAEL F. NEWBOLD
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, NW
Washington, DC 20036
(202) 467-7190
Counsel for Respondents The UMWA Combined Benefit Fund and Its Trustees

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, Congress determined that each employer that voluntarily participated in the collectively bargained multiemployer health care system for active and retired miners in the coal industry and whose former employees were still receiving benefits from that system, should, beginning on February 1, 1993, pay the future health care costs of the retired employees and dependents assigned to that employer by the Secretary of Health and Human Services under the criteria set forth in the statute.

The question presented is whether the Coal Act, as applied to petitioners, violates the Due Process and Takings Clauses of the Fifth Amendment.

LIST OF PARTIES

The captions of the petitions list all the parties to the cases in the courts below. The petition in No. 95-1709 misspells the name of respondent Gail R. Wilensky. The petition in No. 95-1751 misspells the name of respondent Elliot A. Segal.

After this litigation began, the functions assigned to the Secretary under the Coal Act were transferred by Congress to the Commissioner of Social Security. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(2)(A), 108(h)(9)(A), 108 Stat. 1472, 1487-88 (1994).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1709

TEMPLETON COAL COMPANY, INC., *et al.*,
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DONNA E. SHALALA, *et al.*

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DAVON, INC.,
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BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 75 F.3d 1114.[1] The opinion of the district court (Pet. App. 34a-83a) is reported at 882 F. Supp. 799. An earlier opinion of the district court (Pet. App. 84a-109a) is reported at 855 F. Supp. 990. The district court's order in No. 95-1709 (Pet. App. 110a-112a) is not reported.

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[1] "Pet. App." refers to the appendix in No. 95-1709.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056. Neither petition reproduces the statute in full. The petition in No. 95-1709 omits 26 U.S.C. § 9722, as well as the Coal Act amendments to the Surface Mining Control and Reclamation Act of 1977 (the "Surface Mining Act"), which are codified in principal part in 30 U.S.C. § 1232(h). The petition in No. 95-1751 also omits the amendments to the Surface Mining Act, as well as the prefatory provisions of the Coal Act, which set forth the Act's title and Congress's findings and declarations of policy. Accordingly, the entire statute, as it appears in the Statutes at Large, is reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Both petitions present an incomplete and misleading account of the origins of the Coal Act, the problem that Congress sought to address, the nature of the legislative solution, and the rationale for the congressional action. Similarly, both petitions omit any description of the reasoning of the courts below, both of which (like all of the other federal courts that have rendered judgment on the Coal Act) rejected petitioners' arguments and sustained the statute in its entirety.

To put the Coal Act and the present dispute in its proper context, we first review the nearly 50-year history of the UMWA Health & Retirement Funds, petitioners' substantial participation in those Funds, and the financial crisis that afflicted the Funds, as petitioners and more and more employers like them discontinued their participation and left their former employees behind, either to receive no retiree health care at all or to obtain such care at the expense of other employers. We then turn to the Coal Act itself and its legislative history, explaining the provisions of the statute, the reasons for the congressional

intervention, and the basis for Congress's conclusion that the problem could not be solved through private collective bargaining. Finally, we summarize the decisions below and the grounds on which petitioners' constitutional challenges were rejected.

A. The UMWA Multiemployer Health And Medical Funds

For more than forty years, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multiemployer bargaining association representing various companies in the coal industry, have entered into a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements ("NBCWAs"). Each NBCWA required signatory coal operators to pay contributions to finance health benefits for both active and retired miners and their dependents through multiemployer benefit plans. The origin of these plans was an historic agreement between the federal government and the UMWA.

1. *The Establishment of the UMWA Multiemployer Health Care System*

The first coal industry multiemployer benefit plan was created in an agreement between the UMWA and the United States, in settlement of a national strike during which the federal government had seized virtually all of the nation's coal mines. The dispute began when, during collective bargaining negotiations between the UMWA and the bituminous coal operators, the UMWA proposed that the parties create a health and welfare fund for its members. The employers rejected the proposal and a strike ensued. In an effort to end the strike and avoid further disruption in the coal and other industries, President Truman issued Executive Order No. 9728 on May 21, 1946, directing Secretary of the Interior Julius Krug to seize the mines. The order also authorized Secretary Krug to negotiate with the UMWA for changes in the miners' terms and conditions of employment.

Those negotiations culminated in what is known as the Krug-Lewis Agreement. The Krug-Lewis Agreement created a multiemployer benefit plan called the United Mine Workers of America Welfare and Retirement Fund (the "1946 W&R Fund"). The 1946 W&R Fund was intended to provide various health and retirement benefits to UMWA miners and their dependents and survivors. In addition, under the Krug-Lewis Agreement, the federal government committed to conduct a comprehensive study of medical facilities and medical care in the nation's coal mining areas. At the request of Secretary Krug, that survey was conducted, and a report prepared, by Rear Admiral Joel T. Boone of the United States Navy Medical Corps.

In 1947, the UMWA and coal operators created a new multiemployer benefit plan known as the 1947 UMWA Welfare and Retirement Fund (the "1947 W&R Fund"), which succeeded to the assets and liabilities of the 1946 W&R Fund. Like its predecessor, the 1947 W&R Fund was created to make payments to UMWA miners and their dependents for a broad range of health and retirement benefits. By the end of December 1948, the 1947 W&R Fund had provided medical benefits and pensions to more than 250,000 coal miners and their families in 26 states.

In 1950, the UMWA and coal operators created a new multiemployer fund called the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). The 1950 W&R Fund succeeded to the assets and liabilities of the 1947 W&R Fund. Like the 1946 W&R Fund and the 1947 W&R Fund, the 1950 W&R Fund was intended to provide pension and health benefits to UMWA miners and their dependents.[2]

[2] Employer contributions to the 1950 W&R Fund were not tax deductible until 1954, when Congress amended the Internal Revenue Code. Congress wrote the amendment in such a way that it effec-

In July 1950, building upon the 1947 W&R Fund's medical program, the 1950 W&R Fund introduced a comprehensive hospital and medical care program. The program included the payment of unlimited hospitalization and in-hospital medical care for the following classes of beneficiaries: working and unemployed miners; working and unemployed miners' wives and dependent children under age 18; retired miners and their wives; widows of deceased miners; and relatives of deceased miners who cared for the miners' orphaned children. The program's hospital and medical care coverage for miners' widows terminated only upon their remarriage.

During the 28 years of their existence, from 1946 to 1974, the 1950 W&R Fund and its predecessors provided comprehensive health care coverage to UMWA active and retired miners and their families. As such, the Funds had a significant impact on the economies of the bituminous coal producing states and the UMWA mining families that lived in those states. During this period, the 1950 W&R Fund and its predecessors collected approximately $3.9 billion in contributions from signatory coal operators, and paid approximately $1.5 billion in hospital and medical care benefits, $283 million in survivors and other related benefits, and approximately $2 billion in pension benefits.[3]

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tively applied only to the 1950 W&R Fund. *See* 26 U.S.C. § 404(c) (1954). In recommending the amendment, the Senate Finance Committee emphasized that the fund was "established during a period of Government operation" and was "the result of an agreement between employee representatives and the United States Government during a period of Government seizure and operation of most of the facilities of the industry." S. Rep. No. 1622, 83d Cong., 2d Sess. 56 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4623, 4687. *See also* H.R. Rep. No. 2543, 83d Cong., 2d Sess. 43 (1954), *reprinted in* 1954 U.S.C.C.A.N. 5280, 5303.

[3] Over the years, the 1950 W&R Fund from time to time increased, decreased, or suspended certain benefits. For example, on January 15, 1954, the 1950 W&R Fund limited the duration of

2. The Establishment of the UMWA 1950 and 1974 Benefit Trusts

The 1950 W&R Fund continued to provide health benefits through the term of the 1971 NBCWA, which ended in 1974. Under the 1974 NBCWA, however, partly in response to the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), BCOA and the UMWA agreed to divide the 1950 W&R Fund into four separate multiemployer plans.[4] Two of the four new plans provided pension benefits to retired miners. The other two plans provided health benefits to retired miners. One of the health benefit plans, known as the United Mine Workers of America 1950 Benefit Plan and Trust (the "1950 Benefit Trust"), provided health benefits to UMWA miners who retired before 1976. The second plan, known as the United Mine Workers of America 1974 Benefit Plan and Trust (the "1974 Benefit Trust"), provided

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hospital and medical coverage for widows, dependent children, and orphans of deceased miners to the twelve-month period during which a survivors benefit was paid on their behalf. On April 11, 1960, the 1950 W&R Fund imposed hospital and medical care eligibility restrictions for unemployed miners and miners disabled as a result of work-related injuries. On January 19, 1967, the eligibility for widows and dependent survivors of both working and retired miners was partially restored. Finally, on November 13, 1973, the 1950 W&R Fund restored the eligibility for hospital and medical care benefits for widows of miners killed in mine accidents and miners disabled as a result of work-related injuries. As had been the case before such eligibility was first limited in 1954, these beneficiaries' eligibility for hospital and medical benefits was restored for their lives or, in the case of surviving spouses, until they remarried.

[4] In 1974, Congress again enacted special provisions in the Internal Revenue Code to alleviate potential tax burdens that otherwise would have accompanied the restructuring of the 1950 W&R Fund. The rationale supporting these special provisions was the same as the one that supported the original enactment of Section 404(c) of the Internal Revenue Code twenty years earlier.

health benefits for miners who retired in 1976 or thereafter as well as for the active work force.[5]

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. The 1978 NBCWA continued the multiemployer approach for providing health benefits to persons who retired before January 1, 1976, but it provided that persons who retired on or after that date would receive their health benefits from single-employer plans maintained by the retirees' "last NBCWA signatory employer." The 1974 Benefit Trust was retained to provide health benefits on a multiemployer basis to those persons who retired on or after January 1, 1976 and whose last signatory employers were no longer in business.

B. The Crisis That Threatened The UMWA Trusts' Beneficiaries And The Efforts To Resolve It

During the past decade, the problems that led to the 1978 restructuring of the collectively bargained multiemployer health care system became more acute and threatened the 1950 and 1974 Benefit Trusts' ability to continue providing health benefits to their beneficiaries. The uncertainty of continued health benefits for active and retired UMWA miners led to substantial labor strife in the nation's bituminous coal mining regions and threatened the economies of several coal producing states.[6]

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[5] The UMWA multiemployer health and medical benefit plans, *i.e.*, the 1946 W&R Fund, 1947 W&R Fund, 1950 W&R Fund, and the 1950 and 1974 Benefit Trusts, are collectively referred to herein as the "UMWA Trusts."

[6] *See, e.g.*, 136 Cong. Rec. S12312 (statement of Senator Rockefeller) (daily ed. Oct. 2, 1989) ("the [UMWA health] funds contribute many millions of dollars to the West Virginia economy and

One of the most serious of these labor disputes was a ten-month strike by the UMWA against the Pittston Coal Company and its related entities. When collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and appointed former Secretary of Labor William J. Usery as mediator. As part of the eventual settlement of the dispute, Secretary Dole established a special advisory commission called the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). The Secretary authorized the Coal Commission to analyze the retiree health care crisis and recommend a solution. Former Secretary Usery was appointed Chair of the Coal Commission.

In November 1990, the Coal Commission submitted its findings and recommendations to Secretary Dole in a report entitled "Coal Commission Report: A Report to the Secretary of Labor and the American People." [7] In analyzing the health care crisis in the coal industry, the Coal Commission stated that ensuring the continued provision of health benefits to UMWA retirees and their dependents should be the primary objective of any proposed solution:

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

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sustain the efforts of many health care practitioners and organizations. If allowed to continue unchecked, the financial difficulties in the UMWA health funds could cripple health care delivery in West Virginia and in coal counties of states like Alabama, Arkansas, Colorado, Illinois, Indiana, Kentucky, Ohio, Pennsylvania, and Virginia").

[7] A copy of the Coal Commission Report has been lodged with the Clerk of this Court.

Coal Commission Report at 1. Recognizing the historical origins of the UMWA Trusts, the Coal Commission observed:

> The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

Id. at 29. The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in a financial crisis." *Id.* at 2.

First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." Coal Commission Report at 2.[8] Second, it recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million." *Id.* Finally, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." *Id.* In light of these facts and its finding that the 1950 and 1974 Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission predicted that the Ben-

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[8] The Coal Commission found that, while companies contributing to the UMWA multiemployer health benefit system in 1950 represented 80 percent of the coal produced in the nation, "by 1990, companies making contributions to the [UMWA Benefit Trusts] account[ed] for only 30 percent of national coal production." Coal Commission Report at 2.

efit Trusts would have a combined estimated deficit of $300 million by 1993. *Id.* at 3.

The Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis. Coal Commission Report at 3. The Commission therefore recommended two statutory approaches. Under the first approach, the Commission called for the creation of two new funds: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators to finance the health care of UMWA orphan retirees; and (2) a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. *Id.* at 61-64. The second approach called for the creation of a single, private multiemployer plan to provide health benefits to UMWA retirees in the 1950 and 1974 Benefit Trusts, including the orphan retirees. *Id.* at 65-69. To produce the revenue that the first approach would have generated through an industry-wide tax, the second approach contained a financing scheme that imposed liability not just upon employers that signed the 1978 or a later NBCWA, but upon *all* employers and their related business entities that were, at one time, signatory to one or more NBCWAs:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts,* establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator.

Id. at 65 (emphasis supplied); *see also id.* at 67.

C. Congressional Solution To The Health Care Crisis In The Coal Industry—The Coal Act

Following the Coal Commission's Report, Congress undertook its own intensive examination of the subject. The Coal Act was the final product of those deliberations.[9] In enacting the Coal Act, Congress found that:

> it is necessary to modify the private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

App. 1a, *see* 26 U.S.C. § 9701 (historical note). Congress further stated that the policy of the Coal Act is:

> to remedy problems with the provisions and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

App. 1a, *see* 26 U.S.C. § 9701 (historical note).

In the Coal Act, Congress created two new trust funds for the provision of health care benefits to retired miners and their dependents. One of those funds, the UMWA Combined Benefit Fund (the "Combined Fund"), is at

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[9] Templeton's assertion that there was no opportunity for public comment on Congress's decision to include pre-1978 signatory operators in the Coal Act financing plan (Templeton Pet. 7 n.5) is unfounded. The Coal Act was the subject of intensive public debate and lobbying in Congress, and numerous coal companies opposing the legislation joined together to press their views on both the Coal Commission and Congress. *See, e.g.*, the several references in the Coal Commission Report to the views of the so-called Private Benefit Alliance. That those efforts were unsuccessful hardly means that there was no opportunity for them to be made.

issue here.[10] As the statute required, the 1950 and 1974 UMWA Benefit Trusts were merged into the Combined Fund as of February 1, 1993. *See* 26 U.S.C. § 9702(a)(2). The Combined Fund now provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Trusts. 26 U.S.C. § 9703(a), (b)(1), (e), (f).

In the Coal Act, Congress adopted a financing arrangement for the Combined Fund similar to the alternative approach recommended by the Coal Commission, under which only employers that were signatory to one or more NBCWAs are required to share the burden of financing health benefits for the affected retirees and their dependents. Each employer's annual liability to the Combined Fund is based on the number of beneficiaries that have been assigned to it by the Secretary in accordance with a specific list of priorities set forth in the statute. *See* 26 U.S.C. § 9706. Under the detailed statutory criteria, the Secretary is required to place a higher assignment priority on post-1978 NBCWA signatories than on pre-1978 NBCWA signatories.[11] The Coal Act also assigns to 1988 NBCWA signatories the financial responsibility

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[10] The Coal Act also created the 1992 United Mine Workers of America Benefit Plan ("1992 Plan"), an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employers. *See* 26 U.S.C. § 9712.

[11] Specifically, the assignment rules provide that the Secretary is first required to assign each retiree to the employer that was signatory to the 1978 NBCWA or any subsequent NBCWA and that most recently employed the retiree for at least two years. 26 U.S.C. § 9706(a). If the Secretary cannot assign a retiree to a coal operator pursuant to this first method, she is next required to assign the retiree to the coal operator that was signatory to the 1978 NBCWA or any subsequent NBCWA, and that employed the retiree most recently in the coal industry, without regard to the number of years of employment. Third, if she cannot assign a retiree to a coal operator pursuant to the first two methods, the Secretary is required to assign the retiree to the pre-1978 signatory

for funding the start-up costs of the Combined Fund, 26 U.S.C. § 9704(i)(1)(A), and for eliminating any deficit of the 1950 and 1974 Benefit Trusts as of February 1, 1993, the termination date of the 1988 NBCWA and the date on which the Combined Fund began providing benefits under the statute, 26 U.S.C. § 9704(i)(1)(B).

D. Petitioners' Participation In The UMWA Trusts And Their Role In The Financial Crisis Leading To The Passage Of The Coal Act

During the 1920s, John A. Templeton established several coal mining companies throughout Indiana, including three of the petitioners in No. 95-1709. He first incorporated Templeton in 1920. Thereafter, he incorporated Princeton in 1923, followed by Sherwood-Templeton in 1929. All three companies mined coal primarily in Indiana using UMWA-represented employees. Currently, Sherwood-Templeton and Templeton own mineral rights in numerous coal properties throughout Indiana and "engage[] in the usual activities incident to the ownership of interests in such property." Additionally, Sherwood-Templeton manages approximately 5,500 acres of coal lands in Greene and Sullivan Counties, Indiana. The Templeton companies were all NBCWA signatories and collectively participated in the UMWA Trusts for more than twenty years.[12]

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operator that employed the retiree for the longest period of time. If the Secretary cannot identify any NBCWA signatory operator that remains in business (or that has a "related person" remaining in business) and that formerly employed a particular retiree, the retiree is designated an "unassigned beneficiary," and his health benefits are financed by the statutory transfers of funds from the UMWA 1950 Pension Plan or the Abandoned Mine Reclamation Fund and, if necessary, by the assigned operators' payment of an unassigned beneficiaries premium. *See* 26 U.S.C. §§ 9704(d), 9705, 30 U.S.C. § 1232(h).

[12] Specifically, Princeton was a signatory to the 1950 NBCWA and to the 1951, 1952, 1955, 1956, and 1958 amendments to the 1950 NBCWA. It participated in the UMWA Trusts until 1966. Templeton was a signatory to the 1950 NBCWA and the 1951 and 1952

Berwind, the last of the petitioners in No. 95-1709, has its own extremely complex corporate structure spanning more than 75 years, with bituminous coal mining operations in at least five states. Specifically, Berwind-White Coal Mining Company ("Berwind-White") was incorporated in Pennsylvania in 1915. Berwind-White was a direct signatory to the 1950 NBCWA and the 1951, 1952, 1955, 1956, and 1958 amendments to the 1950 NBCWA. Although it ceased direct mining activities in 1962, in January 1963, as a result of a merger with another coal company, Berwind-White became a 98% shareholder of Reitz Coal Company ("Reitz").[13] Berwind-White continued to engage in coal mining activities through Reitz. Reitz was a signatory to the 1968, 1971, 1974, 1978, and 1981 NBCWAs. It contributed not only to the 1950 W&R Fund but also to the 1950 and 1974 Benefit Trusts. In 1967, Berwind-White changed its name to Berwind Corporation. Berwind is thus the same corporate entity that, directly or indirectly (through its subsidiary Reitz), participated in the UMWA Trusts for nearly 40 years, until at least 1984, when the 1981 NBCWA was terminated.

Davon's predecessor corporation, the New York Coal Company ("New York Coal"), was incorporated in 1902, and was engaged in bituminous coal mining from November 1933 through January 1954. While it was engaged in bituminous coal mining, New York Coal employed UMWA-represented miners and was signatory to the 1950

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amendments to that agreement. Templeton participated in the UMWA Trusts until at least 1954. Sherwood-Templeton was a signatory to the 1950 NBCWA and the 1951, 1952, 1955, 1956, and 1958 amendments thereto. Sherwood-Templeton discontinued its participation in the UMWA Trusts in 1960. Thereafter, in 1967, Templeton acquired a 100% interest in Sherwood-Templeton.

[13] Berwind subsequently acquired the remaining 2% and became the sole shareholder of Reitz. In September 1964, another coal company, New River and Pocahontas Consolidated Coal Company ("New River") merged into Berwind-White.

NBCWA and the 1951 and 1952 amendments thereto. It participated in the UMWA Trusts from their inception in 1946 through January 1954, when New York Coal sold its coal mining assets.

Among the five petitioners, Berwind has by far the largest obligation to the Combined Fund under the Coal Act. In the Secretary's original assignment of Combined Fund beneficiaries in the fall of 1993, Berwind was assigned 914 beneficiaries; no other petitioner was assigned more than 117 beneficiaries. None of these beneficiary assignments is at issue here. The Coal Act (and the Secretary, by implementing regulations) provide a mechanism for challenging the assignment of beneficiaries. *See* 26 U.S.C. § 9706(f); 20 C.F.R. §§ 422.601-607. Judicial review of the Secretary's final administrative determinations following such challenges is available under the Administrative Procedure Act. No such review is involved in these cases.[14]

Although petitioners have varying corporate histories, they all share important factual ties. Specifically, petitioners were all signatories to one or more NBCWAs and therefore reaped the economic benefits not only of the miners' labor but also of the maintenance of a stable available pool of skilled labor, which the UMWA multiemployer health care system encouraged and supported. As NBCWA signatories, petitioners all participated in that health care system. When petitioners ceased to participate in the UMWA Trusts, they stopped paying con-

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[14] Petitioners incorrectly characterize their initial assessments under the Coal Act as first-year premiums. Templeton Pet. 9; Davon Pet. 10. In fact, no assessments could be made until the Combined Fund's second plan year, after the Secretary completed the assignment of beneficiaries under 26 U.S.C. § 9706. Accordingly, the initial assessments (and the amounts reported by petitioners) were the sum of the premiums for the Combined Fund's first plan year (February-September 1993) and second plan year (October 1993-September 1994), and were to be paid in twelve equal monthly installments during the second plan year. *See* 26 U.S.C. § 9704(g).

tributions to the UMWA Trusts. The UMWA Trusts, however, continued to provide comprehensive health care benefits to petitioners' retirees. During the period after petitioners ceased to participate in the UMWA Trusts, and before the Coal Act became effective, these benefits were financed entirely by other coal companies. In light of this background, petitioners' claims that they are strangers to the UMWA Trusts are disingenuous and inaccurate.

E. Petitioners' Constitutional Challenges to the Coal Act

In September and November 1993, petitioners filed these actions, alleging that the Coal Act violates the Due Process and Takings Clauses of the Fifth Amendment. The district court rejected the due process claim, explaining that:

> Plaintiffs have simply failed to show that it was irrational for Congress to determine that operators under the NBCWAs of the 1950s and 1960s remain, at least in some part, responsible for retiree health benefit liabilities. The dispute about when lifetime benefits were promised to retired mine workers, and by whom, is a multisided contest, pitting coal mine operators from different eras against one another, as well as involving present and former mineworkers and their families. A congressional decision to come down on the side of the retirees and their spouses and dependents is not totally void of reason.

Pet. App. 58a. The court likewise rejected petitioners' takings claim, ruling that none of the three factors addressed by this Court in evaluating such claims in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), supports the contention that the Coal Act effects an unconstitutional taking. Pet. App. 80a.

The court of appeals affirmed. The court rejected petitioners' argument that the Coal Act's financing provisions violate due process, emphasizing Congress's deliberative approach in deciding to look to all NBCWA signatories to finance the Combined Fund:

> Congress certainly had several alternatives available to finance the Combined Fund. It could have restricted required contributions to the signatories of the latest NBCWA or, at the other extreme, raised funds from all existing coal companies or from general tax revenues. Congress also had several intermediate alternatives. For example, it could have reached back only to the 1978 NBCWA, which created the "guarantee" and "evergreen" clauses; to the 1974 NBCWA, which created the 1950 and 1974 Trusts; or to the 1950 NBCWA, which created the predecessor of all the trusts. . . . The existence of several such rationales for the Coal Act demonstrates that Congress's decision to reach back to 1950 NBCWA signatories was far from arbitrary.

Pet. App. 18a-19a. The court likewise rejected petitioners' Takings Clause argument, concluding, as the district court had before it, that "all three of the *Connolly* factors demonstrate that the Coal Act does not unconstitutionally take property from plaintiffs without compensation." Pet. App. 32a. In the court's words, "the existence of a proportional financing scheme, the lack of any reasonable expectation that plaintiffs would not be liable under the Coal Act, and the economic character of the Act, which only readjusts the benefits and burdens of economic life, preclude us from finding an unconstitutional taking." *Id.*

ARGUMENT

The decision of the court of appeals is correct, and review by this Court is not warranted. There is simply no unresolved or controversial question of federal constitutional law presented here. Four panels of three courts of appeals (including the decision below) have unqualifiedly upheld the constitutionality of the Coal Act in the face of challenges like petitioners'. *See Blue Diamond Coal Co. v. Secretary of HHS, et al.*, 79 F.3d 516 (6th Cir. 1996), *pet. for rehg. pending* (filed April 29, 1996); *Barrick Gold Exploration, Inc., et al. v. Hudson, et al.*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64

(1995); *LTV Steel Company, Inc., et al. v. Shalala, et al.*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995).

In addition, several district courts have held that the Coal Act comports fully with the Due Process and Takings Clauses of the Fifth Amendment. *See Holland v. Eagle Coal & Dock Co.*, Civ. No. 2:94-0880 (S.D. W. Va. Mar. 8, 1996); *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D. W. Va. 1996); *Holland v. Imperial Colliery Co.*, Civ. No. 1:94-0793 (S.D. W. Va. Dec. 7, 1995); *Holland v. Milburn Colliery Co.*, Civ. No. 1:94-0801 (S.D. W. Va. Dec. 7, 1995); *Lindsey Coal Mining Co. Liquidating Trust v. Shalala*, 901 F. Supp. 959 (W.D. Pa. 1995), *appeal docketed*, No. 95-3626 (3d Cir. Nov. 16, 1995) (oral argument heard on June 3, 1996); *Holland v. Keenan Trucking Co.*, Civ. No. 2:93-1223 (S.D. W. Va. Mar. 15, 1995), *appeal docketed*, No. 96-1262 (4th Cir. Feb. 21, 1996). *But see Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D. Pa. 1995) (order relying on Takings Clause as basis for preliminary injunction in favor of related person alleging inability to pay) (motions for summary judgment pending).

There is no suggestion by petitioners that a conflict among the courts of appeals exists, or is even likely to occur in the future. Oddly, Davon concedes as much, stating that "no conflict is reasonably forthcoming[,]" yet it still urges the Court to grant review because of the alleged risk that other courts will "continue with their overly broad reading and mechanical misapplication of *Connolly*." Davon Pet. 19. It is a rare petition indeed that cites the absence of conflict in the courts below as an affirmative reason for granting review. Here, as in other cases, the agreement among the courts of appeals and district court, and the consistency of the many rulings upholding the Coal Act with the precedents of this Court, militate strongly against further examination of the same

legal arguments that have repeatedly been rejected without dissent in jurisdiction after jurisdiction.

I. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' ARGUMENT THAT A HEIGHTENED STANDARD OF DUE PROCESS REVIEW SHOULD BE APPLIED TO THE COAL ACT

Davon pursued a due process argument in the courts below but has not mentioned it in this Court. The Templeton petitioners continue to advance their "substantive due process" attack, but they do so by urging the Court to abandon the well-established "rational basis" standard for reviewing economic legislation and instead to employ a heightened level of scrutiny that petitioners characterize as the " 'harsh and oppressive' standard." Templeton Pet. 10. Petitioners contend that this standard is appropriate because of the allegedly "retroactive" nature of the Coal Act.

Missing from petitioners' argument is even the slightest acknowledgment of the court of appeals' exhaustive treatment of this subject. *See* Pet. App. 12a-25a. As the court of appeals correctly stated, "Supreme Court precedent could not be more clearly contrary" to petitioners' position. Pet. App. 14a. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), squarely held that the rational basis test governs due process review of economic legislation, and that the same standard applies whether the legislation is classified as prospective or retroactive. *Id.* at 14-18 (rejecting due process challenge to Black Lung Benefits Act and explaining that retrospective feature of statute should be sustained as long as it is rational). *See also Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (applying rational basis test in rejecting due process challenge to Multi-Employer Pension Plan Amendments Act ("MPPAA"), and stating that constitutional "burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose").

By contrast to the Black Lung Benefits Act and MPPAA, the Coal Act does not require any payments for periods before the statute's enactment. The Coal Act focuses entirely on *future* health care coverage for eligible beneficiaries. It does not upset, or alter in any way, prior contractual obligations concerning the provision of health care benefits during the period before the Combined Fund began providing benefits on February 1, 1993. Indeed, the statute expressly provides that it shall have no effect on pre-February 1, 1993 contractual obligations to provide retiree health benefits. 26 U.S.C. § 9708. The Coal Act thus left prior collective bargaining agreements unchanged and fully effective, recognized that future collective bargaining with an ever-decreasing number of employers could not solve the problems of the UMWA Trusts, and therefore prospectively substituted a new remedial statutory system for the preexisting contractual regime.

Contrary to petitioners' assertions, the Coal Act is not "retroactive" in any constitutionally significant way. As this Court has long held, "[a] statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 443, 449 (1934). The Court recently reaffirmed that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf v. USI Film Products*, —— U.S. ——, 114 S. Ct. 1483, 1499 (1994) (citations omitted). As the Eighth Circuit has stated, a statute that "imposes liability for the *present and future* conditions resulting from past acts" is not retroactive. *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 741 (8th Cir. 1986) (emphasis in original).

But, even if the Coal Act is considered to be retroactive (notwithstanding the foregoing authority), it survives due process scrutiny because it satisfies the rational basis standard described above. Congress made a rational decision to require all NBCWA signatories that participated in the UMWA Trusts and that are assigned operators under the criteria of 26 U.S.C. § 9706 to shoulder a proportional share of the costs necessary to resolve a health care crisis.

The court of appeals found a host of support for Congress's decision to include pre-1978 signatories (including petitioners) as a source of financing for the Coal Act. The court pointed to the fact that every NBCWA signatory profited from the labor of its retired miners and shared some responsibility for creating the retirees' expectation of lifetime health benefits. Pet. App. 19a-21a. The court also cited practical considerations that supported Congress's rationale, namely, that inclusion of all NBCWA signatories in the Coal Act financing scheme would help to assure adequate funding for the Combined Fund and to avoid economic conflict in the bituminous coal industry. Pet. App. 22a-23a. The court further observed that, even if the Coal Act is thought to be retroactive, petitioners' due process attack "ignore[s] precedent upholding the unlimited retroactive reach of the Comprehensive Environmental Response Compensation and Liability Act ('CERCLA')." Pet. App. 23a. *See, e.g., United States v. Monsanto Company*, 858 F.2d 160, 173-74 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

In sum, the Templeton petitioners have done no more than rehash arguments that the court of appeals explicitly considered and rejected. There is simply no support for petitioners' position that a heightened standard of review should be applied to the Coal Act's financing plan, and there is no basis to conclude that that plan is arbitrary or irrational.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COAL ACT DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF PETITIONERS' PROPERTY

At the core of petitioners' Takings Clause argument is their contention that they have no more connection to Coal Act liability than does the general public, that they are legal "strangers" to the Combined Fund and therefore can have no continuing obligation to the Combined Fund. Davon Pet. 2, 3, 5, 12-13, 20-21; Templeton Pet. 3, 8 n.7, 11, 13, 20-22. Davon declares this to be the "significant constitutional difference" between the Coal Act and the cases decided under the MPPAA. Davon Pet. 20; *see Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly*, 475 U.S. 211 (1986).

Petitioners' argument that they have no connection to the Combined Fund is without merit and did not convince the court of appeals:

> [T]he consecutive NBCWAs created a continuous multi-employer scheme for providing health benefits from approximately 1950 to the present. Each of the plaintiffs participated in at least one of the NBCWAs since 1950 and thus had experience with the multi-employer plans. Plaintiffs' argument regarding experience, rather than proportionality, is only persuasive if we accept the premise that the multi-employer plans of 1974 and after are sufficiently different from prior NBCWAs such that experience with the former does not constitute experience with the latter. . . . We find the distinction wholly unpersuasive. Each consecutive NBCWA, including those after 1974, accomplished the same end—to provide benefits to miners until the next NBCWA—using the same means—funding on a multi-employer basis. . . . [E]very coal operator that participated in the multi-employer plans contributed directly to the retirees' legitimate expectations of lifetime benefits. Plaintiffs' "experience with

> the plan[s]" that eventually became the Combined Fund is easily deduced on the facts of this case.

Pet. App. 28a.

As the court explained, while petitioners were signatories to NBCWAs, they contributed to the 1950 W&R Fund and its predecessors. Petitioners' employees accumulated, based on their work for petitioners, service credits that contributed to their entitlement to retiree health benefits from the 1950 W&R Fund and, after 1974, from the 1950 Benefit Trust or the 1974 Benefit Trust. Petitioners' former employees actually received benefits from the UMWA Trusts for years, even though petitioners were not contributing to those Trusts. And when, under the Coal Act, the 1950 and 1974 Benefit Trusts were merged into the Combined Fund, petitioners' former employees became Combined Fund beneficiaries by operation of law.

Petitioners' assertion that they are "strangers" to the legacy of providing health care benefits to retired coal miners and their dependents is insupportable. Petitioners rest their entire argument on the division of the 1950 W&R Fund into four separate funds in 1974, following the enactment of ERISA, which necessitated the separation of pension plans from health benefit plans. It is not relevant in a constitutional sense that the names of the funds changed or that the pension and health components of the funds were segregated into different entities in 1974. As the court of appeals stated, "[n]othing radical happened in 1974." Pet. App. 28a. What is significant is that petitioners actively and voluntarily participated in a system that, for nearly fifty years, provided health care benefits to retired coal miners and their dependents, and through which a legitimate expectation of lifetime benefits was created. That system, although threatened in the 1980s with financial collapse, remained constant in all relevant respects from the time of petitioners' participation until the passage of the Coal Act in 1992. Every entity that signed an NBCWA and contrib-

uted to these funds and had former employees that received health benefits from them is connected to this system.

Moreover, petitioners falsely claim lack of responsibility for the crisis that led to the passage of the Coal Act. *See* Davon Pet. 12; Templeton Pet. 24. Petitioners participated in a system that engendered legitimate expectations of lifetime benefits, and, as the court below said, "[t]heir withdrawal from participation in the trusts helped create the financial crisis that resulted in the Coal Act." Pet. App. 21a. When petitioners decided to cease their participation in the NBCWA and stopped contributing to the 1950 W&R Fund, the costs of providing health benefits for their retirees and dependents were assumed by the remaining signatories to the current and future NBCWAs. When this practice of "dumping" by former NBCWA signatories multiplied years later, the entire system was pressed to the brink of ruin.[15]

The court of appeals correctly concluded that all three Takings Clause factors identified by this Court in *Connolly* and other cases support the validity of the Coal Act. Those three factors are the character of the governmental action, the economic impact of the regulation, and the

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[15] Petitioners claim that Coal Act beneficiaries will not be injured or affected in any way if petitioners prevail in this lawsuit and are relieved of their Coal Act liability. Davon Pet. 11 n.2; Templeton Pet. 13. They argue that if they do not finance the benefits of their assigned beneficiaries, others will do so, and the beneficiaries will receive the same benefits regardless. This argument points up the very problem that created the funding crisis in the first place. Petitioners assume there is an infinite well of resources that can be tapped if they (and all other pre-1974 signatories, according to their logic) are excused from their Coal Act obligations, just as they assumed that they could dump their retirees on the remaining coal operators with impunity before the passage of the Coal Act. It takes little study to realize that every time that an operator ceased to contribute to the UMWA Trusts, the system became weaker, and every time a Coal Act assigned operator ceases contributing to the statutory funds, the Coal Act financing scheme is similarly weakened.

extent to which the regulation has interfered with distinct and reasonable investment-backed expectations. *Connolly*, 475 U.S. at 224-25. *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

As this Court has observed, "[i]t is well settled that a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 477, 488 n.18 (1987), quoting *Penn Central*, 438 U.S. at 124 (citations omitted). By creating a statutory program to ensure that retired miners will continue to receive health benefits, the Coal Act is a classic example of the latter kind of government regulation.

Davon is wrong in asserting that the result reached below and by the Sixth Circuit in *Blue Diamond* would make the Takings Clause inapplicable in cases involving personal property. *See* Davon Pet. 16-17. Consistent with this Court's decisions, both courts of appeals correctly considered the economic regulatory nature of the Coal Act as a factor in determining whether an unconstitutional taking had occurred. Pet. App. 30a-32a; *accord*, *Blue Diamond*, 79 F.3d at 526. As the court of appeals wrote in this case, "[w]hen [petitioners] and other employers withdrew from the multiemployer plans, they left behind retired miners with legitimate expectations of lifetime benefits. As the number of employers continued to decline, the number of beneficiaries grew, and the result was a seriously underfunded health benefit program." Pet. App. 31a. Congress enacted the Coal Act to address this problem.

The contention of the Templeton petitioners (Pet. 13) that "the law was not passed to benefit former employees" and that the Coal Act "purely benefits the BCOA Operators" is misguided. Petitioners overlook a critical point.

Every NBCWA—not only the NBCWAs and numerous amendments that petitioners signed but the several later NBCWAs, including the NBCWAs of 1974, 1978, 1981, 1984, and 1988—was effective only for a term of years. This was just as true of the NBCWAs that referred to a "Health Services card until death" as it was to the earlier agreements. After each contract was terminated, the continued provision of health care depended on the negotiation and signing of a new national collective bargaining agreement that contained such benefits. But, as the years went by, fewer and fewer employers were willing to sign such an agreement. That is why fewer and fewer employers were carrying the burden of the UMWA Trusts and why both Congress and the Coal Commission concluded that the problem of financing retiree health care in the coal industry could not be solved through the collective bargaining process. In the absence of a legislative solution, BCOA operators and other signatories of the 1988 NBCWA, like petitioners and many other employers before them, could have refused to sign a new collective bargaining agreement in 1993 or thereafter and then claimed that they had no further obligation to fund health care for their own former employees or anyone else's. Petitioners' argument ignores the central question that confronted Congress during its deliberations on the Coal Act: who would pay for retiree health care in the coal industry after termination of the 1988 NBCWA, and in particular who would pay for benefits for the retirees of employers like petitioners, which had long since discontinued their financial support for the UMWA Trusts.

It was to answer this question that Congress chose to assess Coal Act obligations based on a finding of "responsibility" derived from past employment relationships rather than past contractual promises. Nothing in the Takings Clause prevents Congress from assigning greater importance to the question of how many former employees an employer has in the Combined Fund than to the question of which or how many NBCWAs an employer has signed.

Turning to the economic impact factor, the court of appeals properly focused on the question "whether the basis for regulating [petitioners] under the Coal Act—their participation in prior NBCWAs—is proportional to the economic impact caused by the Act." Pet. App. 27a. The court correctly concluded that "[t]he Coal Act's financing scheme is based on proportionality." *Id.* Far from being determined "in a vacuum," petitioners' Coal Act obligations are proportional to petitioners' own participation in the UMWA retiree health care system and to the number of beneficiaries that petitioners helped to add to that system and to the Combined Fund. The Coal Act thus does not involve any disproportionate economic impact that would raise constitutional concern. *See Connolly*, 475 U.S. at 225-226.

In addition, the Coal Act contains provisions that are intended to lessen the economic impact on assigned operators. Indeed, the Coal Act obligations of petitioners and all other assigned operators have been reduced substantially by the three $70,000,000 transfers from the UMWA 1950 Pension Plan to the Combined Fund and by the first of several anticipated transfers from the Abandoned Mine Reclamation Fund. 26 U.S.C. § 9705; 30 U.S.C. § 1232(h). These transfers have eliminated the requirement that assigned operators like petitioners pay any unassigned beneficiaries premiums during the Combined Fund's first four fiscal years. Of course, in the absence of the Coal Act, neither petitioners nor any other assigned operator would have had any legitimate claim to benefit from any of the assets of the 1950 Pension Plan. These assets were held in trust for the exclusive benefit of the Plan's beneficiaries. Likewise, absent the Coal Act, neither petitioners nor any other assigned operator could legitimately have expected to receive any benefit from the Abandoned Mine Reclamation Fund.

Davon's reliance on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), is misplaced. Davon Pet. 13-14. Although the taking identified in *Webb's* in-

volved a comparatively small dollar amount, that is not the end of the economic impact inquiry. The effect of regulation is to be measured in relation to the party's experience with the subject matter of the statute at issue. *See Connolly*, 475 U.S. at 226; *Blue Diamond*, 79 F.3d at 525 ("The Supreme Court has stated that the proper inquiry in a multi-employer benefit plan context is whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue.") Under this analysis, even the total elimination of a company's net worth by a government regulation has been held not to violate the Takings Clause. *See Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), *cert. pending*, No. 95-1807 (filed May 6, 1996) (application of cross-guaranty provisions of FIRREA did not constitute taking despite elimination of bank's net worth); *Meriden Trust & Safe Deposit Co. v. Federal Deposit Insurance Corp.*, 62 F.3d 449 (2d Cir. 1995) (same).

Finally, the remaining Takings Clause factor, *i.e.*, the extent to which regulation has interfered with distinct, investment-backed expectations, cannot help petitioners. Petitioners have failed to identify any such expectations. Although petitioners claim that the Coal Act is unconstitutional because it imposes financial obligations that were not foreseeable based on their prior contractual commitments, an alleged lack of foreseeability is not the same thing as interference with distinct, investment-backed expectations. It is well-established that Congress's power to legislate is not confined by the terms of pre-existing private contracts. Pet. App. 30a, *quoting Connolly*, 475 U.S. at 223-24 (citations omitted). Thus, as the district court stated when it denied petitioners' request for a preliminary injunction, "[r]egarding the interference with investment-backed expectations, this court takes the Plaintiffs' argument to be nothing more than a statement that they have gone on to do other things since abandoning coal mining. They have not shown that reliance on the language of the NBCWAs justified an expectation that

they would never have responsibilities to their own retirees or to others retiring from that industry. That argument was laid to rest in *Connolly*." Pet. App. 105a-106a.

Moreover, petitioners' argument that, because the 1950 W&R Fund was a "pay-as-you-go" plan, its beneficiaries could not have had a legitimate expectation of lifetime health care, and that pre-1974 signatory employers therefore have some impermeable constitutional protection against future statutory liability for such care, is untenable. The 1950 W&R Fund and its predecessors provided continuous health benefits to both active and retired coal miners for nearly three decades before the 1974 NBCWA. As the court of appeals explained (Pet. App. 29a), plaintiffs' argument

> ignores the fact that they substantially participated in a system that provided continuous benefits and created legitimate expectations that such provisions would not cease. Any expectation that they could never be held liable for retired miners' health benefits, in light of their participation in the NBCWAs, was not reasonable.

See also UMWA v. Nobel, 720 F. Supp. 1169, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991) (referring to "the 25-year history of lifetime benefits prior to 1974").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. MOONEY
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, NW
Washington, DC 20005
(202) 783-0010

DAVID W. ALLEN
Office of the General Counsel
UMWA Health and Retirement Funds
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

June 28, 1996

PETER BUSCEMI
Counsel of Record
MICHAEL F. NEWBOLD
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, NW
Washington, DC 20036
(202) 467-7190
Counsel for Respondents The UMWA Combined Benefit Fund and Its Trustees

APPENDIX

APPENDIX

Subtitle C—Health Care of Coal Miners

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

"CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS

"Subchapter A—Definitions of General Applicability

"Sec. 9701. Definitions of General Applicability.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.—

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404 (c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan

described in section 404(c) (or a contination thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3) 1974 UMWA PENSION PLAN.—The term '1974 UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA BENEFIT PLAN.—The term '1992 UMWA Benefit Plan' means the plan referred to in section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section—

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section—

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means a person which is or was a signatory to a coal wage agreement.

"(2) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

"(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relaitonships shall be determined as of the time immediately before such operator ceased to be in business.

"(3) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

"(4) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(5) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible benefi-

ciary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) BUSINESS.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA

Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

"(3) TREATMENT OF PLAN.—The Combined Fund shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

"(b) BOARD OF TRUSTEES.—

"(1) IN GENERAL.—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"(C) two individuals designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

"(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. Plan Benefits.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), the coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the

plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined under subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

"(II) the trustees elect to use to pay benefits for the current year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

"(3) QUALIFIED PROVIDERS.—The trusees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

"(4) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

"(e) LIMITATION ON ENROLLMENT—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits

from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

"PART II—FINANCING

"Sec. 9704. Liability of Assigned Operators.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

"(A) the amount determined by dividing—

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(3) ADJUSTMENTS FOR MEDICARE REDUCTIONS.—If, by reason of a reduction in benefits under title XVIII of the Social Sesurity Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable per-

centage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

"(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited

to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

"(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

"(C) NO AUTHORITY FOR INCREASED PAYMENTS.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

"(f) APPLICABLE PERCENTAGE.—For purposes of this section—

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.—

"(1) IN GENERAL.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(2) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.—

"(1) 1988 AGREEMENT OPERATORS.—

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs

of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

"(ii) DEFICIT PAYMENTS.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which

are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

"(iii) LIMITATION.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

"(iv) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subpargraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this pargraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"(3) STARTUP COSTS.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

"Sec. 9705. Transfers.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN.—

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

("C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unas-

signed beneficiary premium under section 9704 (a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER.—

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1)—

"(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

"(5) TREATMENT OF TRANSFER.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject

to liability, taxes, fines, or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND.—

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

"Sec. 9706. Assignment of Eligible Beneficiaries.

"(a) IN GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under pargaraph (1), to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes

of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and rec-

ords maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned op-

erator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under section (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III—ENFORCEMENT

"Sec. 9707. Failure to Pay Premium.

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day

in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations.

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

"Subchapter C—Health Benefits of Certain Miners

"PART I—INDIVIDUAL EMPLOYER PLANS

"Sec. 9711. Continued Obligations of Individual Employer Plans.

"(a) COVERAGE OF CURRENT RECIPIENTS.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an in-

dividual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

"(b) COVERAGE OF ELIGIBLE RECIPIENTS.—

"(1) IN GENERAL.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

"(2) COVERAGE.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

"(c) JOINT AND SEVERAL LIABILITY OF RELATED PERSONS.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be

jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).

"(d) MANAGED CARE AND COST CONTAINMENT.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

"(e) TREATMENT OF NONCOVERED EMPLOYEES.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

"(g) RULES APPLICABLE TO THIS PART AND PART II.—For purposes of this part and part II—

"(1) SUCCESSOR.—The term 'last signatory operator' shall include a successor in interest of such operator.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such

successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

"PART II—1992 UMWA BENEFIT PLAN

"Sec. 9712. Establishment and Coverage of 1992 UMAW Benefit Plan.

"(a) CREATION OF PLAN.—

"(1) IN GENERAL.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

"(2) TREATMENT OF PLAN.—The 1992 UMWA Benefit Plan shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)).

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee

Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(b) COVERAGE REQUIREMENT.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

"(2) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means an individual who—

"(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

"(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

"(c) HEALTH BENEFITS.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) MANAGED CARE.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

"(3) MAJOR ELEMENTS OF RULES.—Elements described in this paragraph are—

"(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

"(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

"(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaies from balance billing by providers,

"(D) utilizing, in the claims payment function 'appropriateness of service' protocols under

title XVIII of the Social Security Act if more stringent,

"(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

"(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

"(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

"(4) LAST SIGNATORY OPERATORS.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

"(5) STANDARDS OF QUALITY.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established—

"(A) by the settlors, or

"(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

"(d) GUARANTEE OF BENEFITS.—

"(1) IN GENERAL.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

"(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

"(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

"(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

"(2) ADJUSTMENTS.—The 1992 UMWA Benefit Plan shall provide for—

"(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

"(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

"(3) ADDITIONAL LIABILITY.—Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

"(4) JOINT AND SEVERAL LIABILITY.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

"(5) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(6) 1988 LAST SIGNATORY OPERATOR.—For purposes of this section, the term '1988 last signatory operator' means a last signatory operator which is a 1988 agreement operator.

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

"Sec. 9722. Sham Transactions.

"If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

(b) AMENDMENTS TO SURFACE MINING ACT.—

(1) EXTENSION OF FEE PROGRAM.—Section 402 (b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004".

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection:

"(h) TRANSFER OF FUNDS TO COMBINED FUND.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Rev-

enue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g)(1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".

Supreme Court, U.S.
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JUN 28 1996
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Nos. 95-1709 and 95-1751

In the Supreme Court of the United States

OCTOBER TERM, 1995

TEMPLETON COAL COMPANY, INC., ET AL., PETITIONERS

v.

SHIRLEY CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

DAVON, INC., PETITIONER

v.

SHIRLEY CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

31PP

QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, violates the Due Process Clause or the Just Compensation Clause of the Fifth Amendment as applied to petitioners.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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[1] The responsibilities of the Secretary of Health and Human Services under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, were transferred to the Commissioner of Social Security as of March 31, 1995. See Social Security Independence and Program Improvements Act of 1994 (1994 Act), Pub. L. No. 103-296, §§ 105(a)(1) and (2)(A), 108(h)(9)(A) and (B), 110(a), 108 Stat. 1472-1473, 1487-1488, 1490. In accordance with Section 106(d) of the 1994 Act, 108 Stat. 1477, the Commissioner of Social Security is substituted for the Secretary of Health and Human Services as a party in this case. See Sup. Ct. R. 35.3.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[2] is reported at 75 F.3d 1114. The opinion of the district court granting summary judgment in favor of respondents in the *Templeton Coal* case (Pet. App. 34a-83a) is reported at 882 F. Supp. 799. The opinion of the district court granting summary judgment in favor of respondents in the *Davon* case (95-1751 Pet. App. B1-B10) is not reported. The order of the district court in *Templeton Coal* denying a preliminary injunction (Pet. App. 84a-109a) is reported at 855 F. Supp. 990; a prior order of that court granting a preliminary injunction (Pet. App. 110a-112a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996. The petition for a writ of certiorari in No. 95-1709 was filed on April 22, 1996. The petition for a writ of certiorari in No. 95-1751 was filed on April 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.* (Coal Act or Act), was enacted in response to a crisis in health care costs in the coal industry. The Act has its origins in a series of collective bargaining agreements between coal mine operators and the United Mine Workers of America (UMWA). Those contracts, known as National Bituminous Coal Wage Agreements

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[2] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 95-1709.

(NBCWAs), created multi-employer benefit plans that provided health care benefits to active and retired miners and to their dependents. See Pet. App. 2a-6a.

The health care benefits of coal miners, their dependents, and their survivors have for many years been a central issue in labor relations in the coal industry. In 1946, the federal government nationalized the coal industry in response to a UMWA strike over health and retirement benefits. The government and the UMWA subsequently negotiated a contract (the Krug-Lewis Agreement) that, among other things, established employer-sponsored health and retirement programs. In 1947, after the mines were returned to private control, the UMWA and the Bituminous Coal Operators Association (BCOA) entered into the first NBCWA, which created a multi-employer health and welfare fund. Pet. App. 3a.

In 1950, a successor NBCWA established another multi-employer fund, known as the 1950 Welfare and Retirement (W&R) Fund, to provide health care benefits to active and retired miners and to their dependents. Retired miners qualified for health care and other retirement benefits from the 1950 W&R Fund on the basis of portable service credits, which they accrued through their employment with NBCWA signatory operators. Pet. App. 60a. The 1950 W&R Fund was financed through per-ton royalties paid by signatory coal operators according to rates specified in successive NBCWAs or amendments. *Id.* at 3a-4a.

The 1950 W&R Fund provided both health and retirement benefits for active and retired miners until 1974, when Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* In response to ERISA's new

funding requirements for pension plans, the 1974 NBCWA divided the 1950 W&R Fund into four "trusts," two of which—known as the 1950 Benefit Trust and the 1974 Benefit Trust—financed medical benefits. (The other two trusts covered retirement benefits for miners, and are not at issue in this case.) The 1950 Benefit Trust provided health care benefits to miners who retired before 1976, and to their dependents. The 1974 Benefit Trust initially provided health care benefits to active miners, to miners retiring subsequently, and to their dependents. The 1974 NBCWA expressly promised that covered retired miners would retain health benefits for life. Pet. App. 38a.

The 1978 NBCWA limited the coverage of the 1974 Benefit Trust to "orphan" retired miners whose last coal industry employer had gone out of business or had otherwise ceased contributing to the trusts, and to their dependents. Responsibility for the health care benefits of non-orphaned retirees, as well as active miners, was shifted to the individual coal operators remaining in business. Pet. App. 4a-5a. The 1978 NBCWA contained a guarantee clause, which obligated signatories to make sufficient contributions to ensure payment of the lifetime benefits promised in the 1974 NBCWA, and an "evergreen" clause, binding 1978 signatories to the levels of funding specified in the 1978 and subsequent NBCWAs, whether or not they actually signed subsequent agreements. *Id.* at 39a.

2. By the 1980s, a combination of demographic and economic factors seriously impaired the financial stability of the 1950 and 1974 Benefit Trusts. First, as throughout American industry, the costs of health care rose steeply. Second, structural changes in the

coal industry caused substantial reductions in both the number of mine operators that were signatories to the NBCWAs and the number of active coal miners employed by signatory operators. Third, several employers that ended operations successfully contended in court that their obligation to provide health benefits to retired employees ceased with the last NBCWA that they signed, and that the 1974 Plan was responsible for their retirees' medical benefits. Thus, as more operators stopped contributing to the trusts, their withdrawals forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for newly orphaned retirees as well as their own retirees. See Pet. App. 4a-5a.

After a protracted strike in 1989-1990 at the Pittston Coal Company, in which health benefits were a major issue, the Secretary of Labor established a bipartisan advisory commission to study the financial crisis confronting the Benefit Trusts. Pet. App. 5a. The Coal Commission identified the escalating costs of paying for "orphan" retirees as a primary source of the financial crisis. *Coal Commission Report: A Report to the Secretary of Labor and the American People* 2 (Nov. 1990) (*Coal Commission Report*). The Coal Commission proposed two possible solutions: an industry-wide funding plan taxing all current coal operators, and a more limited arrangement funded by past and present NBCWA signatories. *Id.* at viii, 60-65.

3. In October 1992, after extensive hearings on the health care crisis in the coal industry and submission of the recommendations of the Coal Commission, Congress enacted the Coal Act. See Pub. L. No. 102-486, Tit. XIX, Subtit. C, 106 Stat. 3036. The Coal Act was intended "to remedy problems with the

provision and funding of health care benefits * * * to the beneficiaries of [coal industry] multiemployer benefit plans"; to ensure "sufficient operating assets" for such plans; and "to provide for the continuation of a privately financed self-sufficient program" for delivering health care to the plan beneficiaries. *Id.* § 19142(b), 106 Stat. 3037. Congress also found that, to ensure the proper functioning of interstate commerce, the coal industry's existing system for funding retiree health benefits had to be modified "to identify persons most responsible for plan liabilities." *Id.* § 19142(a)(2), 106 Stat. 3037.

The Coal Act established a new private multiemployer plan, the UMWA Combined Benefit Fund (Combined Fund), as the successor to the 1950 and 1974 UMWA Benefit Plans. 26 U.S.C. 9702(a)(1)-(2).[3] The Combined Fund is required to provide beneficiaries of the 1950 and 1974 Plans with substantially the same health benefit coverage that those plans provided. 26 U.S.C. 9703(b)(1). Health benefits under the Combined Fund are limited to retired miners and their dependents who were eligible to receive, and were receiving, benefits from the 1950 and 1974 Plans as of July 20, 1992. 26 U.S.C. 9703(e)-(f). The Combined Fund thus has a closed class of beneficiaries, the membership of which will diminish over time.

The Combined Fund is financed primarily through annual premiums. 26 U.S.C. 9704. Those premiums must be paid by companies that signed one or more NBCWAs, or that made contributions to the 1950 and 1974 Plans under related "me-too" wage agreements that they signed (collectively, signatory operators).

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[3] The Act also creates another plan, the 1992 UMWA Benefit Plan, which is not at issue in this case. See 26 U.S.C. 9712.

See 26 U.S.C. 9701(b)(1) and (3), 9701(c)(1). The Coal Act bases the amount of premiums on the principles that each signatory operator should bear the cost of providing benefits to its own retirees, and that all signatories should share proportionally in the industry-wide cost of providing benefits to orphan retirees. Towards the first end, the Act directs the Commissioner of Social Security to match beneficiaries of the Combined Fund with the signatory operator responsible for paying for their health care benefits. 26 U.S.C. 9706(a). Assignments are made pursuant to a statutory formula designed to place the primary burden on signatory operators who signed NBCWAs in 1978 and thereafter. *Ibid.* If a company ceased participating in NBCWAs prior to 1978, it is not assigned responsibility for its former employees and their dependents unless those employees did not work for any surviving signatory operator that signed an NBCWA in 1978 or thereafter, and those employees worked for the company (or a related entity) longer than they worked for any other surviving operator. See 26 U.S.C. 9706(a)(1)-(3).

Signatory operators are also potentially responsible for a proportional share of the premiums for orphan beneficiaries, *i.e.*, retired miners whose former coal-industry employers have all gone entirely out of business. To mitigate that additional burden, however, the Act makes available additional sources of funding for the Combined Fund. 26 U.S.C. 9705; 30 U.S.C. 1232(h). Thus far, the existence of those additional funding sources has meant that petitioners (indeed, all signatory operators) have not been required to pay premiums for unassigned beneficiaries. Pet. App. 63a n.10.

4. In these cases, signatory operators that ceased coal mining operations before the 1974 NBCWA have brought a constitutional challenge to the funding obligations of the Coal Act as applied to them. Petitioners Davon, Inc., and Templeton Coal Company signed the 1950 NBCWA,[4] and Templeton signed succeeding NBCWAs in the 1950s and 1960s. Based on their participation in one or more NBCWAs, petitioners were assigned beneficiaries under the Coal Act and are obligated to pay annual premiums to the Combined Fund. During the time that petitioners conducted mining operations pursuant to those NBCWAs, their employees accrued service credits, which were counted in determining their eventual eligibility for health benefits under the 1950 and 1974 Trusts. See p. 3, *supra*.

Petitioners filed separate suits in the United States District Court for the Southern District of Indiana to enjoin the enforcement of their financial obligations under the Act. They contended that those obligations violate the Due Process Clause and Just Compensation Clause of the Fifth Amendment. In both cases, the district court granted summary judgment for respondents and upheld the constitutionality of the Coal Act's funding obligations. Pet. App. 34a-81a; 95-1751 Pet. App. B1-B10.

5. a. The court of appeals consolidated petitioners' appeals and affirmed. Pet. App. 1a-32a. Addressing

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[4] Petitioner Davon is the corporate successor to the New York Coal Company, which mined coal until 1954 pursuant to the terms of the 1950 NBCWA. Pet. App. 9a-10a. The suit brought by petitioner Templeton Coal (No. 95-1709) was joined by petitioners Sherwood-Templeton Coal Company, Inc., Princeton Mining Company, and Berwind Corporation; we refer to those petitioners collectively as "Templeton."

first their due process challenge (*id.* at 12a-25a), the court noted that the Coal Act is "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'" *Id.* at 12a (quoting *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978)). It therefore held that the Coal Act is subject to review only under the "minimum scrutiny, rational basis test," under which economic legislation need only be "supported by a legitimate legislative purpose furthered by rational means." *Id.* at 12a-13a.

Although the court agreed with petitioners that the Act's funding obligations operate retroactively as applied to them, it rejected their contention that such retroactive legislation requires a more stringent review. Pet. App. 13a-14a. Observing that "Supreme Court precedent could not be more clearly contrary to [petitioners'] position," *id.* at 14a, the court of appeals read this Court's cases to hold that "the same due process standard applies to retroactive economic legislation," *id.* at 16a, and that "the burden to justify retroactivity in economic legislation 'is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose,'" *id.* at 17a (quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)).

The court of appeals concluded that Congress had acted rationally in requiring Combined Fund contributions from companies, such as petitioners, that had left the coal business before 1974; indeed, it suggested that it would have been irrational for Congress not to require funding from the signatories to the 1950 NBCWA. See Pet. App. 19a. The court first noted

that every signatory operator had profited from the labor of its retired miners. *Ibid.* It also pointed out that, even though the NBCWAs that petitioners signed had not expressly provided for lifetime health care benefits for miners, the various NBCWAs had in fact created a system providing lifetime benefits to retirees for almost fifty years; thus, Congress had rationally concluded that miners had a "legitimate expectation * * * of lifetime health benefits," and that "the promise of lifetime benefits dates back to the 1940s." *Id.* at 20a. Petitioners, the court observed, "were part of this tradition and can rationally be said to have contributed to a reasonable expectation of lifetime health benefits." *Id.* at 21a. The court further concluded that Congress had reason to believe that contributions from all signatory operators were necessary to ensure adequate funding for the Combined Fund and to prevent further economic conflict in the coal industry. *Id.* at 22a.

b. The court of appeals also rejected petitioners' taking claims (Pet. App. 25a-32a) under an application of the three factors identified by this Court in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986): "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" Pet. App. 26a.

With respect to the economic impact of the Coal Act on petitioners, the court concluded that the impact was "directly related" to petitioners' participation in prior NBCWAs, since their funding liability for their own retirees and for orphan retirees is based on the number of retirees that they had employed. Pet. App. 27a. With respect to petitioners' investment-backed

expectations, the court rejected petitioners' argument that they could have had no expectation that they would be made liable for their retirees' health benefits. The court noted that the federal government had shown intense interest in coal miners' health benefits since the 1946 UMWA strike, that troubled labor relations in the coal industry had been resolved through establishment of a multi-employer plan, and that "stability in the coal mining industry was of national importance and that federal intervention to avoid instability was foreseeable." *Id.* at 29a. Moreover, the court stressed, petitioners "substantially participated in a system that provided continuous benefits and created legitimate expectations that such provisions would not cease." *Ibid.*

As for the third factor (the "character" of the governmental action), the court emphasized that the Coal Act does not physically invade petitioners' property or permanently appropriate their assets to governmental use. Pet. App. 30a-31a. Relying on *Connolly*, 475 U.S. at 225, the court concluded that the Coal Act merely "adjusts the benefits and burdens of economic life to promote the common good," and therefore "does not constitute a taking." Pet. App. 31a.

ARGUMENT

The decision of the court of appeals is one of a series of appellate decisions rejecting constitutional challenges to the Coal Act. See *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832 (6th Cir.), cert. denied, 116 S. Ct. 64 (1995); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995); *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir.

1996).[5] The decision in this case is correct and does not conflict with any decision of this Court or other courts of appeals. Further review is therefore not warranted.

1. a. Petitioner Templeton claims (95-1709 Pet. 9-18) that the Coal Act's funding obligations, as applied to coal operators who ceased participating in NBCWAs prior to 1974, violate substantive limits on economic legislation imposed by the Due Process Clause.[6] But the Coal Act "come[s] to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As long as a "statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Moreover, "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Ibid.* Even

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[5] The *Blue Diamond* decision also involved coal companies that, like petitioners, were not signatories to the 1974 NBCWA; the Sixth Circuit upheld the Coal Act on reasoning similar to that of the court of appeals in this case. An appeal presenting similar constitutional issues is currently under submission in the Third Circuit. *Lindsey Coal Mining Co.* v. *Chater*, No. 95-3626 (argued June 3, 1996). Other cases presenting similar issues are pending in district courts in Massachusetts, Pennsylvania, Texas, and the District of Columbia.

[6] Petitioner Davon advanced the same argument in the court of appeals but has not renewed it in this Court.

when a statute has retroactive effect, the Due Process Clause is satisfied as long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730.

The funding provisions of the Coal Act, including the imposition of premium obligations on pre-1974 signatory operators like Templeton, satisfy the standards of rational-basis review. The Coal Act's objective—resolution of the financial crisis in the health care system for coal miners—is plainly legitimate.[7] Congress knew, from the long experience of labor relations in the coal industry dating from the federal takeover of the coal mines in the 1940s through the Pittston strike of the 1980s, that the crisis in health care benefits threatened to deprive thousands of retired coal miners and their dependents of their health benefits, and also threatened seriously to disrupt interstate commerce. See Pub. L. No. 102-486, Tit. XIX, Subtit. C, § 19142(b), 106 Stat. 3037. Given the importance of coal production to the national economy and the prospect that those problems could lead to further labor unrest and inflict economic harm on coal operators and retired miners, the Coal Act plainly advances a legitimate government purpose.

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[7] Templeton suggests (95-1709 Pet. 13) that the Coal Act "was not passed to benefit former employees," but rather was meant solely to benefit coal operators who signed NBCWAs in 1974 and thereafter. That assertion ignores the declared policies of the Act. Moreover, even if Congress's actual motives were in doubt, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [statute] actually motivated the legislature." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

As for the means by which Congress accomplished that objective, Congress had at hand several options for allocating the cost of financing the Combined Fund. It could have restricted the financing obligation to signatories of the then-current NBCWA. Alternatively, Congress could have chosen to impose a tax on the coal industry as a whole, or paid for the benefits out of general revenues. It also had a number of intermediate options, each of which would have required line-drawing. It could have drawn the line at the 1978 NBCWA, which created the "guarantee" and "evergreen" clauses; the 1974 NBCWA, which established the 1950 and 1974 Trusts; the 1950 NBCWA, which created the immediate predecessor of those trusts; or some other point.

Each of those classifications would have been justifiable as a response to the financial crisis in the health care system for miners. Templeton, of course, argues that when Congress decided to include pre-1974 NBCWA signatories in the funding mechanism, it drew the line at the wrong place. But that kind of line-drawing exercise is a quintessentially legislative task, and "there is no need for mathematical precision in the fit between [the] justification and means" chosen by the legislature. *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 639 (1993).

Congress acted rationally in requiring pre-1974 signatory operators to contribute to the Combined Fund. Every such operator previously employed miners who were entitled to receive retirement health benefits from the 1950 and 1974 Benefit Trusts. Those trusts were multi-employer trusts; miners received their entitlement to health care benefits based on portable service credits obtained from operators

who signed one of the NBCWAs in effect since 1950. Moreover, those trusts provided "comprehensive health care benefits for retired miners and their families" for 45 years, *Coal Commission Report* vii, and retired miners had "legitimate expectations of health care benefits for life" from the trusts, *id.* at 1. As the Sixth Circuit observed in rejecting the same challenge, all of those mine operators "directly contributed to the Combined Fund's liabilities by providing service credits to [their] former employees." *Blue Diamond Coal*, 79 F.3d at 523. It was therefore proper for Congress to require all the coal operators who contributed to the liabilities of the benefit funds to pay some of the cost of restoring the financial stability of the health care system. See *Concrete Pipe*, 508 U.S. at 637-638.

In addition, all signatory operators, including those that had left the business of coal mining, benefited substantially from participation in the multi-employer benefit system that was established in the 1940s and was facing a crisis in the early 1990s. First, they plainly benefited from their own miners' labor. See 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992) ("technical explanation" of 1992 Coal Act introduced by Sen. Wallop) (Coal Act assigns financial responsibility to "those companies which employed the retirees in question, and thereby benefitted from their services"). Moreover, all signatory operators benefited from the ease of movement of miners and the labor peace throughout the industry to which those multi-employer trusts (with their portable service credits) significantly contributed. See *Blue Diamond Coal*, 79 F.3d at 524; cf. *Concrete Pipe*, 508 U.S. at 638-639. Congress therefore reasonably concluded that all signatory operators should be held

financially responsible for making good on the "moral obligation to the [miners] and retirees" to contribute towards the cost of their health care. See *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985).

Congress also rationally concluded that inclusion of pre-1974 signatory operators in the Coal Act's financing scheme was necessary to secure adequate funding for the health care of retired coal miners and their dependents. Financial and actuarial figures presented at 1991 Senate hearings called into question the feasibility of limiting the so-called "reachback" provision to 1978 and later NBCWA signatories. A more limited reachback provision could well have left a significant number of beneficiaries of the 1950 UMWA Benefit Trust "orphaned." See Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 24-27 (Comm. Print 1993); 138 Cong. Rec. H11,413 (daily ed. Oct. 5, 1992) (Rep. Rahall) (noting that "75 percent of the retirees served by the [UMWA] health funds never worked for, or had any connection with, a currently contributing company"). Given that possibility, it was "surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

Templeton argues (95-1709 Pet. 13) that, because it left the coal industry before 1974, it is less responsible for the problems addressed by the Coal Act than companies that continued to participate in NBCWAs through the 1970s and 1980s. As explained above, the Coal Act takes account of differences in responsibility for the fiscal crisis by placing the primary

financial burden on operators that signed the 1978 NBCWA and subsequent wage agreements. See p. 7, *supra*. An operator that did not sign the 1978 NBCWA may be assigned a retired miner only if no other existing operator that employed that miner signed the 1978 NBCWA, and only if the operator employed the miner for a longer period of time than any other signatory operator. See 26 U.S.C. 9706(a)(3). Signatory operators like petitioners are the operators of last resort for retired miners who otherwise would be "orphaned"; if petitioners were not required to contribute, the costs of health care for their orphans would have to be borne by a smaller group of operators—exactly the conditions that led to the crisis that precipitated enactment of the Coal Act. In any event, "[i]t is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader [or, here, narrower] cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Turner Elkhorn*, 428 U.S. at 19.

b. Templeton suggests (95-1709 Pet. 10) that there is a conflict between recent decisions of this Court reviewing retroactive laws under the rational basis test and earlier precedents that condemned retroactive legislation determined to be "harsh and oppressive." The Court has already made clear, however, that the "harsh and oppressive" rubric is nothing more than a shorthand for "the [general] prohibition against arbitrary and irrational legislation * * * clearly articulated in *Turner Elkhorn*." *R.A. Gray*, 467 U.S. at 733; see *United States* v. *Carlton*, 114 S. Ct. 2018, 2022 (1994). As long as the retroactive application of a law "is rationally related to a legitimate legislative purpose," it is "consistent with the

Due Process Clause." *Id.* at 2024. The Due Process Clause does not empower a court to condemn rational economic legislation simply because the law might be thought "harsh" or "oppressive" in some respect.

Templeton also asserts (95-1709 Pet. 12) that the "touchstone" of due process analysis of retroactive legislation is "the principle of repose." The Court has made clear, to the contrary, that legislation does not violate the Due Process Clause merely because it disturbs that interest. "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," and "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Turner Elkhorn*, 428 U.S. at 16; *R.A. Gray*, 467 U.S. at 729-730. Thus, contrary to Templeton's related suggestion (95-1709 Pet. 16-17), the Coal Act is not constitutionally infirm merely because companies that ceased participating in NBCWAs before 1974 might not have been able to foresee that Congress one day would impose new financial obligations on them. Foreseeability is not a due process requirement for retroactive legislation. See, *e.g.*, *Carlton*, 114 S. Ct. at 2023-2024; *Turner Elkhorn*, 428 U.S. at 17.[8]

2. Petitioners assert that the Coal Act effects an uncompensated taking of their property in violation of the Just Compensation (Takings) Clause. But as the Court has cautioned, when "due process arguments

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[8] Templeton argues (95-1709 Pet. 13) that the Court might have reached a different result in *Turner Elkhorn* if the coal operators in that case had not known of the danger of pneumoconiosis. The Court's opinion is directly to the contrary; it sustained the statute despite the "possibilit[y] that the Operators may not have known of the danger of their employees' contracting pneumoconiosis." 428 U.S. at 17.

[against economic legislation] are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe*, 508 U.S. at 641 (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)). There is, in fact, no violation in this case.

a. The Court has identified "three factors with particular significance" for assessing whether a government regulation effects an uncompensated taking of property. See *Concrete Pipe*, 508 U.S. at 643. One of those factors, the nature of the governmental action, is crucial here, for the government has not taken any identifiable property of coal operators for its own use, but has only required the operators to contribute financially to a private entity that is responsible for paying the health care costs of retired miners. The basic character of the Coal Act is therefore similar to the provisions governing employers' withdrawal liability to multi-employer pension plans that were sustained in *Connolly* and *Concrete Pipe*. In *Connolly*, the Court explained that the government "d[id] not physically invade or permanently appropriate any of the employer's assets for its own use," but instead imposed a financial obligation on employers to "safeguard[] the participants in multiemployer pension plans." 475 U.S. at 225.[9]

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[9] Davon asserts (95-1751 Pet. 12, 14) that, unlike the companies in *Connolly* and *Concrete Pipe*, it is being called on to finance "a government program." The Combined Fund was expressly established as a private plan, however, see 26 U.S.C. 9702(a)(1), and one of Congress's principal objectives in the Coal Act was "to provide for the continuation of a privately financed self-sufficient program" for delivering health care to retired coal miners expecting health benefits under the private 1950 and 1974 Benefit Trusts. See Pub. L. No. 102-486, Tit.

The same is true of the Coal Act, which implements a "public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225. Even though it might be said that the Coal Act requires petitioners to devote their assets to satisfying their new financial obligations to the Combined Fund, "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Id.* at 223. Thus, petitioners "ha[ve] not identified any of [their] property that was taken without just compensation." *Sperry*, 493 U.S. at 59.[10]

Petitioners attempt to distinguish *Concrete Pipe* and *Connolly* by arguing that the employers affected

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XIX, Subtit. C, § 19142(b), 106 Stat. 3037. The Combined Fund provides benefits to the same people who were receiving benefits from the private 1950 and 1974 Trusts, and it provides the same medical coverage that they enjoyed prior to the enactment of the Coal Act. 26 U.S.C. 9703(b)(1) and (f).

[10] Davon argues (95-1751 Pet. 16-19) that the court of appeals adopted a *per se* rule that a taking cannot occur as long as the government does not physically invade property and acts for the common good. The court of appeals suggested no such rule, and neither do we. The court of appeals did correctly recognize, however, that the character of the governmental regulation is of substantial importance to the taking inquiry. See Pet. App. 30a-31a; cf. *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987). Although there are situations in which the government's uncompensated appropriation of money (as opposed to real, personal, or intangible property) is a taking (see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162-163 (1980)), "[t]his is not a situation where the Government has appropriated all, or most, of the [required contribution] to itself." *Sperry*, 493 U.S. at 62.

in those cases had voluntarily participated in plans that provided vested benefits, and that withdrawal liability was assigned on the basis of plan liabilities incurred during the employers' voluntary association with the plan. See 95-1709 Pet. 20-21; 95-1751 Pet. 16, 19. Although the Court did mention the voluntary nature of that participation in *Concrete Pipe*, that factor was not central to the Court's resolution of the taking issue in either *Connolly* or *Concrete Pipe*. Neither case requires a direct connection between the contractual undertaking of the employer and the liabilities of the multi-employer plan. Cf. *Connolly*, 475 U.S. at 224 ("the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking").

b. The second factor identified by this Court's taking cases concerns the economic impact of the regulation on the claimants. *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 225. Neither Davon nor Templeton suggests that the absolute amount of its premium obligations is sufficient to establish a taking. They evidently accept that the economic-impact factor in this case is fundamentally a matter of proportionality, *i.e.*, whether their funding obligations are proportionate to their participation in the events that led Congress to establish the Combined Fund. See Pet. App. 26a-27a; *Chateaugay*, 53 F.3d at 494; *Connolly*, 475 U.S. at 225. They assert, however, that the Coal Act's impact on them is disproportionate because they did not contribute to the 1950 and 1974 Benefit Trusts and were not made contractually responsible for the liabilities of those trusts (95-1709 Pet. 20-21; 95-1751 Pet. 13-14).

As the court of appeals pointed out (Pet. App. 28a), that argument erroneously assumes a disjunction between the coal industry's pre-1974 and post-1974 retirement health care arrangements. "Nothing radical happened in 1974." *Ibid.* The express promises of lifetime benefits made to miners in the 1970s were not unanticipated, and "every coal operator that participated in the multi-employer plans contributed directly to the retirees' legitimate expectations of lifetime benefits." *Ibid.*

Although Congress properly included all signatory operators within the class of persons obligated to contribute to the Combined Fund, it took care to ensure that signatories that remained in the coal business through the 1970s would bear the brunt of financing the Combined Fund, and that the obligations of operators like petitioners that had left the coal business would be proportionate to their more limited experience with the multi-employer trusts. As explained above (p. 7, *supra*), retirees are presumptively to be assigned to any one of their employers that signed the 1978 NBCWA, if such an employer is still in existence. A retiree may be assigned to an operator that did not sign the 1978 NBCWA only if no post-1978 signatory that employed that retiree still exists, and only if that operator employed the retiree longer than any other company still in existence. As the Second Circuit explained in *Chateaugay*, by "mooring a given company's funding obligations to a legitimate measure of its prior benefit from the UMWA health care system, the Coal Act rationally apportions future financial responsibility according to past participation." 53 F.3d at 494.

c. Finally, this Court's taking cases have considered the extent to which legislation interferes

with "reasonable investment-backed expectations." *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 226. Although Davon asserts (95-1751 Pet. 14) that the Coal Act interferes with its investment-backed expectations, neither Davon nor Templeton has identified any distinct investments that were undertaken or foregone in the expectation that the companies would remain free from liability for the costs of their former employees' retirement health care. Instead, they simply argue that the Coal Act's eventual imposition of liability on them was unforeseeable. See 95-1709 Pet. 22; 95-1751 Pet. 14.

Connolly rejected a similar contention. There, employers that had withdrawn from a multi-employer pension plan when such withdrawal was fully free from liability contended that the subsequent, retroactive imposition of withdrawal liability by Congress upset their reasonable expectations. The Court concluded, however, that because pension plans had long been the objects of legislative concern even before the enactment of ERISA, prudent employers had more than sufficient notice before enactment of the withdrawal liability provisions that withdrawal might trigger future financial obligations. 475 U.S. at 227.

Here too, the long history of federal involvement in the coal industry (and particularly in the issue of health benefits for coal miners) belies the notion that pre-1974 NBCWA signatories could have reasonably expected future immunity from further contribution towards the costs of retired employees' health benefits, especially in the face of the instability and fiscal crisis that led to enactment of the Coal Act. As early as 1946, when the government nationalized the coal mines and negotiated the Krug-Lewis Agreement, it was clear both that the stability of the coal industry

demanded adequate employee health and welfare benefits, and that the federal government was prepared to intervene to ensure the availability of those benefits. The first multi-employer welfare and retirement fund, set up by the 1946 Krug-Lewis Agreement, was managed by three trustees, one of which was appointed by the federal government. *Coal Commission Report* 18-19.[11] From that point on, the federal government's involvement in establishing the health care delivery system for retired miners was extensive. *Id.* at 21, 22, 23, 27-28. Thus, signatory operators that ceased to contribute to the industry's multi-employer health benefit program could hardly have expected that they would escape all financial responsibility in the event of further federal intervention on behalf of their former employees.

Templeton argues (95-1709 Pet. 23) that the Court has required "the presence of existing regulation of the specific subject matter at issue." This Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), however, demonstrates that Templeton's argument lacks merit. *Monsanto* held that EPA's pre-1972 disclosure of trade secrets submitted to the agency under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not constitute a "taking." *Id.* at 1008-1010. The Court acknowledged that, during the period in question, "neither FIFRA nor any other provision of law gave EPA authority to disclose data obtained from Monsanto," but it

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[11] Indeed, the Coal Commission noted that the multi-employer funds providing health care benefits to retired miners were created "in the White House in a contract between the federal government and the UMWA." *Coal Commission Report* vii.

explained that, "[i]n an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of * * * [pesticide data], upon focusing on the issue, would find disclosure to be in the public interest." *Id.* at 1008-1009. So too here: in an industry that has been the focus of as much public concern and governmental regulation as the coal industry, the possibility was surely substantial as early as the 1950s that the federal government would, upon focusing on the issue, find compulsory employer funding of retired miners' health benefits to be necessary to the proper functioning of interstate commerce.

d. Templeton argues further (95-1709 Pet. 24) that the Court's takings jurisprudence requires "a reciprocal benefit to the party whose property is taken." There is no such requirement. While the existence of an "average reciprocity of advantage" may lead to the conclusion that no uncompensated taking has occurred (see *Hodel* v. *Irving*, 481 U.S. 704, 715 (1987)), "the Just Compensation Clause 'has never been read to require the * * * courts to calculate whether a specific individual has suffered burdens * * * in excess of the benefits received' in determining whether a 'taking' has occurred." *Sperry*, 493 U.S. at 61 n.7 (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.21 (1987)).

The fundamental question under the Just Compensation Clause is whether Congress is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227. That is not the case here. It was eminently reasonable for Congress

to conclude that NBCWA signatories as a class bear a collective responsibility, and one greater than that of the public as a whole, for the health care of retired coal miners and their dependents. Coal operators such as petitioners benefited from the labor of those miners as well as from the multi-employer health care system established to benefit the coal industry as a whole. Companies that left the collective bargaining process left behind miners whose retirement health care costs were ultimately borne by other operators. Under those circumstances, "fairness and justice" do not require the public at large to assume the costs of the Combined Fund, nor do they entitle Davon and Templeton to immunity from those costs.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

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No. 95-1709

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TEMPLETON COAL COMPANY, INC., *et al.*,
Petitioners,
v.
SHIRLEY CHATER,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

Of Counsel:
JESSE H. CHOPER
Berkeley, California 94720
(510) 642-0339

ROSEMARY M. COLLYER
Counsel of Record
J. MICHAEL KLISE
TARA W. BLANCHARD
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

DAVID H. GOELLER
WILKINSON, GOELLER, MODESITT,
WILKINSON & DRUMMY
333 Ohio Street
Terre Haute, IN 47808
(812) 232-4311
Attorneys for Petitioners

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REPLY BRIEF OF PETITIONERS

The Briefs in Opposition drain all meaningful content from the Court's decisions on retroactive legislation. Rather than address the extreme retroactivity of the Coal Act, they seek to erase time by arguing that the events of the next forty years were obvious in 1954, when Templeton closed its last coal mine. The implicit claim that Congress enjoys an unlimited right to adopt retroactive economic legislation is clearly contradicted by the Court's decisions. *United States v. Carlton*, 114 S. Ct. 2018 (1994); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Pension Benefit Guar. Corp. v. R.A.*

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[1] The Commissioner of Social Security is substituted for the Secretary of Health and Human Services as a party in this case. *See* Sup. Ct. R. 35.3; Government Brief in Opposition ("Govt Br.") at n.1.

Gray & Co., 467 U.S. 717 (1984); *Usery v. Turner Elkhorn Mining Co.*, 478 U.S. 1 (1976). The petition warrants Court review to define where the constitutional limits lie.

A. 1. The government basically acknowledges that the Coal Act visits "harsh" and "oppressive" consequences on Petitioners Templeton *et al.*, yet argues that the law is "rational economic legislation." Government Brief in Opposition 17-18 ("Govt. Br."). The government's argument subsumes the essential question presented by the petition: can an admittedly "harsh and oppressive" retroactive statute pass constitutional muster as "rational"? The Court has previously equated the "harsh and oppressive" standard with "arbitrary and irrational," *R.A. Gray*, 467 U.S. at 733, suggesting that a retroactive law which imposes harsh and oppressive results is thereby irrational and violative of Due Process. Recent decisions continue to use the phrase, *see Carlton*, 114 S. Ct. at 2022, so we know it is not meaningless. As the Coal Act applies to Petitioners—suddenly imposing a contribution obligation for fifty or more years, mainly to provide benefits to miners' relatives, because Petitioners once employed UMWA miners four decades ago—it provides a best-case scenario for the Court to clarify the standards for judging retroactive economic legislation under the Due Process Clause. The instant petition represents the first case to reach the Court in which the extraordinary retroactivity of the Coal Act is at issue.[2] Direction from the Court is needed to settle whether a retroactive statute affecting economic rights and producing harsh and oppressive results can now, or ever, violate Due Process standards.

2. The court below and the Oppositions erroneously cite the miners' expectations of continued benefits as relevant to the constitutional analysis. Pet. App. 20a-21a; Govt. Br. 14-15; Trustees' Brief in Opposition 21 ("Tr.

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[2] The Coal Act has generated numerous challenges across the country. *See* Govt. Br. 10-11 & n.5.

Br.") However, the constitutional rights of UMWA miners are not in question. The "legitimate expectations" to be analyzed belong to those who bear the burden of a law, not those who benefit from it. The issue is not whether UMWA miners (or, more precisely, miners' spouses and dependents) had a legitimate expectation in 1992 that benefits would continue, but, rather, whether *Petitioners* had a legitimate expectation *in 1954*, when Templeton ceased mining coal, that the terms of the collective bargaining agreement and the relevant law under the National Labor Relations Act, 28 U.S.C. §§ 151 *et seq.*, meant what they said: Petitioners had no obligation and no right to affect future UMWA negotiations because they no longer employed UMWA miners. *See Association of Motion Picture Producers*, 90 N.L.R.B. No. 296 (1950) (a bargaining unit must have at least two employees). Correspondingly, Petitioners were incapable of enjoying any benefits from the later contracts. Petitioners became legal strangers to the UMWA and its collective bargaining.

3. Contrary to the government's argument, Govt. Br. 18, a Due Process analysis does rely, in part, on whether a new liability was foreseeable. *United States v. Hemme*, 476 U.S. 558, 569 (1986); *Turner Elkhorn*, 428 U.S. 17. The government suggests that the Court's decision in *Turner Elkhorn* "is directly to the contrary," Govt. Br. 18 n.8, but only because the Opposition inexplicably omits part of the relevant language. The full statement from *Turner Elkhorn* is that "the justification for the retroactive imposition of liability *must take into account* the possibilities that the Operators may not have known of the danger" of coal dust. *Turner Elkhorn*, 428 U.S. at 17 (emphasis added). The Court did not elaborate in *Turner Elkhorn* because it found those operators had known of pneumoconiosis for 20 years. *Id.* Here, the 1950 NBCWA and those Amendments signed by Petitioners required contributions only for the term of each contract. Petitioners fully satisfied their obligations when

they ceased mining coal, and the miners knew, as the trustees admit, that "the continued provision of health care depended on the negotiation and signing of a new collective bargaining agreement that contained such benefits." Tr. Br. 26. Moreover, the record is clear that miners and retirees did *not* enjoy "continuous health benefits" under the 1950 W&R Fund, as the trustees claim. Tr. Br. 29; *but see* Tr. Br. 5 n.3 (admitting that benefits were "increased, decreased, or suspended" from time to time). Very recently, the Court has highlighted "fair notice and repose" as significant elements to a Due Process review of legislative enactments. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994); *United States v. Carlton*, 114 S. Ct. 2025 (O'Connor, J., concurring) ("[t]he government's interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose"). This case presents the point at which the government's interest must "give way."

4. The trustees suggest that the Coal Commission recommended that all former signatories to the NBCWA be liable for Mine Worker benefits. Tr. Br. 9-10. This is clearly not so. The Commission's recommendation was: "CONGRESS SHOULD IMPOSE A STATUTORY OBLIGATION TO CONTRIBUTE ON SIGNATORIES TO THE [NBCWA] OF 1978 AND ANY SUCCESSOR AGREEMENT." Coal Commission Report at 63 (emphasis in original.)

5. The trustees incorrectly suggest that Berwind continued to mine coal after 1962. Tr. Br. 14. Berwind invested in a new subsidiary, Reitz Coal, after 1962 and Reitz Coal continued its mining operations for some time. But, Reitz Coal is a separate corporation, is not a party, has not challenged its assignments of beneficiaries, and makes monthly contributions to the Combined Fund. Berwind has here challenged the constitutionality of assignments *to Berwind* based on the fact that Berwind, under the name Berwind-White, mined coal and signed

the NBCWA until, facing enormous losses, it closed its last mine in 1962.

6. When the last Petitioner stopped mining coal in 1966, the 1950 W&R Fund had a positive balance of $145,021,431.00. Petitioners played no part in the BCOA's voluntary decision much later to create the 1950 and 1974 Benefit Funds with a zero funding base, to provide benefits to UMWA retirees whose employers were not mining coal, to expand benefits and to offer benefits to new beneficiaries, to promise lifetime benefits, to guarantee full funding, and to fail to make any adjustments to meet those promises as time went by. Presumably, the BCOA members received a collective bargaining benefit from these promises; certainly, Petitioners did not. By 1993, these cumulative promises by the BCOA required all signatories to continue to contribute for retiree health benefits as long as they continued to mine coal, even if not signatory to the NBCWA. *UMWA 1974 Pension Fund v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). It is a myth of litigation, unrelated to the real world, that Petitioners are responsible for the sorry state of the 1950 and 1974 Benefit Funds in 1992. Tr. Br. 15-16.

7. The trustees' fervent wish that the Coal Act were not retroactive as applied to Petitioners, Tr. Br. 20, cannot be squared with the law itself, this Court's prior decisions, and the decision of the court below. *See* Pet. 9-10; Pet. App. 13a-14a. *Because* the law is retroactive, it "does have to meet a burden not faced by legislation that has only future effects." *R.A. Gray*, 467 U.S. at 730. The court below thought the burden was met because Petitioners once employed UMWA miners, retirement benefits must be preceded by years of service, and additional monies might be needed to support the expensive health plan developed by the UMWA and BCOA in the era *after* Petitioners stopped mining coal. Pet. App. 19a-22a; Govt. Br. 14-16; Tr. Br. 21. It is true that each Petitioner

once employed UMWA miners, but that employment relationship was fully satisfied long ago.[3] In any event, Petitioners' obligations under the Coal Act far exceed benefits to their former employees—the law imposes costs for spouses and dependents, who never worked for Petitioners and were not beneficiaries when Petitioners mined coal, and for persons who worked for other companies, plus *their* spouses and dependents. If a desire for more money were sufficient to support every congressional enactment, there would be no constitutional limitation left at all. The arguments posed by the Oppositions demonstrate that this is the appropriate case for review and clarification of Due Process standards.

B. 1. The government claims that the Coal Act comports with the Taking Clause because payment of Coal Act premiums is similar to payment of withdrawal liability under the Multiemployer Pension Plan Amendments Act ("MPPAA"), whose constitutionality was upheld in *Connolly*, 475 U.S. 211, and *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Govt. Br. 18-19.[4] But the general

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[3] The government argues that miners were "entitled" to receive benefits from the 1950 and 1974 Benefit Funds and that, therefore, it is rational to impose costs for those benefits onto Petitioners. Govt. Br. 14-15. Whatever "entitlement" arose because of the promise of lifetime benefits and the guarantee of full funding, it occurred decades after Petitioners stopped mining coal. It is clear that there was no entitlement to benefits extended by the 1950 W&R Fund. Tr. Br. 8 n.3 & 29.

[4] The government invokes the *Connolly dicta* that, because the Court had previously rejected substantive due process challenges to two statutes in *Turner Elkhorn* and *R.A. Gray*, "it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." Govt. Br. 19. But the Court did not forgo a separate Taking Clause analysis and granted *certiorari* in *Connolly* for that very purpose despite the earlier holding in *R.A. Gray*. The two Clauses protect different interests and require different analyses. *See Concrete Pipe*, 508 U.S. at 641-42 (quoting *Connolly dicta* and analyzing Taking Clause issue separately).

similarity noted by the government—neither statute involves a physical invasion of real property—is dwarfed by the dissimilarities that make this case worth the Court's review. As *Connolly* stated, "This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation." *Connolly*, 475 U.S. at 224. The Coal Act differs from MPPAA in terms of (1) the predicate relationship between employers and the fund, (2) the vesting of benefits, (3) the absence of existing employer liabilities to the funds, and (4) the duration of retroactive reach. Pet. 20-21. That these distinctions bear on constitutionality is clear from the concurring opinions in *Connolly* and *Concrete Pipe*. *Id.* at 22-23. Therefore, they warrant the Court's attention here.

2. The government also asserts that Petitioners have not identified any property that was taken without just compensation. Govt. Br. 20. Of course we have—Petitioners' interest in the repose of their long-expired contracts and the millions of dollars Petitioners have already contributed to the Combined Fund, much less what will have to be paid into the middle of the next century. Pet. 9. The government's amalgam of several decisions, principally *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), does not add up to the conclusion that Petitioners cannot identify "property" taken without just compensation. *See* Govt. Br. 20. *Webb's Fabulous Pharmacies* makes clear that money, no less than real property, can be the basis of a Taking claim, and that the government need not appropriate all of a claimant's money for a Taking to occur. To be sure, Congress can legislate in response to perceived emergencies, but in such instances, a "significant, concrete, and disproportionate benefit" must flow to a burdened party before its property can be appropriated for public use. *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992) (collecting cases). Petitioners here

receive no such benefits. It is no answer that Petitioners once benefitted from miners' labor a generation ago. *See* Govt. Br. 26. Petitioners' relationship with the UMWA ended both in fact and in law when they stopped mining coal and employing Mine Workers. The Coal Act imposes an entirely new obligation, for which there is no reciprocal benefit.[5]

3. With respect to the Coal Act's economic impact on Petitioners, the Oppositions contend that there is no disjunction between provisions for the 1950 W&R Fund in the 1950 NBCWA which Petitioners signed, and the new Benefit Plans established in the 1974 and later agreements to which Petitioners were not parties. Govt. Br. 21-22; Tr. Br. 23-24. But the proposition on which they rely—the Seventh Circuit's statement that "nothing radical happened in 1974," Pet. App. 28a—is contradicted by the record and the statute. The district court correctly found that a "significant change" occurred in the 1971 NBCWA, that "[s]ubstantially more radical changes developed as a result of the 1974 NBCWA," and that the 1978 NBCWA "brought about still more changes in UMWA retiree health benefits." Pet. App. 89a-90a. Indeed, the Funds' own 1975 Annual Report characterized the change in the 1974 NBCWA as "one of monumental change which will have long-lasting and historical effects." Thus, contrary to the trustees' revisionist view, Tr. Br. 23, the changes affected much more than just the name of the fund. Pet. 5-6. The statute at least attempts to recognize this reality by prioritizing assignments as between signatories to the 1978 NBCWA and earlier contracts. 26 U.S.C. § 9706.

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[5] The trustees argue that Petitioners receive a "benefit" because, but for the Coal Act, there would be no transfers from the 1950 Pension Plan and the Abandoned Mine Land Reclamation Fund to cover current health care costs for unassigned beneficiaries—the miners (and spouses and dependents) who worked for someone else. Tr. Br. 27. Excuse me? Petitioners had no obligations to these total strangers until the Coal Act was adopted. Avoidance of this wholly new obligation for its first few years is not a "benefit."

4. However, the Coal Act does not rationally apportion liability according to an operator's participation. The government misreads the statute as providing that retirees are "presumptively assigned to any one of their employers that signed the 1978 NBCWA, if such an employer is still in existence." Govt. Br. 22; *see also id.* 8-9. But under the first two statutory assignment priorities, retirees are assigned to a 1978 or later signatory *only if* that signatory both (1) is still in business *and* (2) was "the most recent signatory operator to employ" the retiree. 29 U.S.C. § 9706(a)(1)-(2), Pet. App. 133a. Absent *either* condition, a retiree is assigned to the pre-1978 signatory which is still in business and employed the miner for the longest period of time prior to the 1978 NBCWA. *Id.* § 9706(a)(3), Pet. App. 133a-34a. Thus, for example, if a retiree worked for one of the Petitioners for 5 years, later worked for 4 years for 1978 signatory A that is still in business, and then worked for 8 years for 1978 signatory B that is no longer in business, the retiree would be assigned to the Petitioner, not to 1978 signatory A as the government's interpretation of the statute would suggest. This is because signatory A, though a 1978 signatory and still in business, is not the "most recent signatory operator to employ" the retiree (signatory B was) and thus is not within the first two statutory priorities. The assigned operator (by reason of the third priority) would be the Petitioner, even though the Petitioner was not a 1978 signatory and the retiree had worked for two 1978 signatories. Thus, the Coal Act does not, as the government asserts and as the Taking Clause requires, "rationally apportion[] future financial responsibility according to [these Petitioners'] past participation" in health benefit arrangements. *See* Govt. Br. 22.

5. The government's argument that the Coal Act is constitutional because the Court sustained the constitutionality of MPPAA is flawed. *See* Govt. Br. 23. As we explained in our Petition, the Coal Act presents a signifi-

cantly different issue with respect to interference with Petitioners' legitimate expectations. Pet. 22-24 (citing *Concrete Pipe*, 113 S. Ct. at 2293 (O'Connor, J., concurring)). This issue was not reached by the Court in the MPPAA cases and warrants the Court's review here.

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
JESSE H. CHOPER
Berkeley, California 94720
(510) 642-0339

ROSEMARY M. COLLYER
Counsel of Record
J. MICHAEL KLISE
TARA W. BLANCHARD
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

DAVID H. GOELLER
WILKINSON, GOELLER, MODESITT, WILKINSON & DRUMMY
333 Ohio Street
Terre Haute, IN 47808
(812) 232-4311
Attorneys for Petitioners

Dated: Washington, D.C.
July 10, 1996